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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 56

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL., PETITIONERS,

vs.

ROSS W. SWING, IRENE BOTVIN, NAN CHAPMAN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED APRIL 19, 1940.

CERTIORARI GRANTED MAY 20, 1940.

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IN APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, JUNE TERM, A. D. 1938

Ross W. Swing, Irene Boivin, Nan Chapman, et al.
Plaintiffs,

vs.

American Federation of Labor, John Fitzpatrick, Chicago Federation of Labor, et al., Defendants

Appeal from Circuit Court, Cook County

Honorable Joseph Burke, Judge Presiding.

Abstract of Record--Filed in Supreme Court January 18, 1939

COMPLAINT

Complaint of Ross W. Swing, Irene Boivin, Nan Chapman, Pauline A. Charles, Elmer J. Frueh, Catherine O'Connor, Theresa Insolia, Ellen Jensen, Leah Jenum, Margaret Kessell, Lillian L. Morris, Olga Sembrat, Frances J. Steele, Audrey Storrs, Lydia Strasheim, Martha Reikert, and Margaret Fuentes, against the following: American Federation of Labor; John Fitzpatrick, individually and in his official capacity; Chicago Federal of Labor; John Fitzpatrick, [fol. 5] President, and Anton Johanson, Vice-President, in their respective official capacities and individually; also all members, officers, etc., of the American Federation of Labor and Chicago Federal of Labor, whose names are unknown to plaintiffs; Journeymen Barbers' International Union of America; Frank Rango, Sixth Vice-President, individually and in his official capacity; and all other members of said Union, whose names are unknown to the plaintiffs; Journeymen Barbers' International Union of America, Local 548; its members whose names are unknown to the plaintiffs, and Frank Rango, Secretary and Treasurer, individually and in his official capacity; Hairdressers and Cosmetologists Union, Local 548-D; and its members; Patsy Trotta, Secretary and Treasurer; and Sadie S. Murphy, President; individually and in their official capacity; said complaint alleges as follows:

All of the plaintiffs (other than Ross W. Swing) are employed by Ross W. Swing, and are all of his employees in a beauty shop owned and operated by said Swing in the City of Chicago, County of Cook and State of Illinois, under the trade name and style of Manor Beauty Salon. Defendant, Hairdressers and Cosmetologists Union, Local No. 548-D, is a voluntary union or association, composed of many persons whose names are unknown to plaintiffs and who are too numerous to be sued; defendants, Patsy Trotta, Sadie Murphy, Felix Rose and N. C. Iannella are affiliated with said union as members, agents, directors or officers; Journeymen Barbers' International Union of America, Local No. 548, is a voluntary association, composed of many persons unknown to the plaintiffs and too numerous to sue; [fol. 6] Frank Rango is affiliated with the union as a member and Secretary and Treasurer of said Local; Journeymen Barbers' International Union of America is also a voluntary association composed of many members, too nuerous to be sued, and the names of said members being unknown to plaintiffs; defendant, Frank Rango, is a member and sixth Vice-President of the Union; Chicago Federation of Labor is also a voluntary association composed of many members, unknown to the plaintiff's and too numerous to be sued; John Fitzpatrick and Anton Johanson are affiliated with said Union as members and as President and Vice-President thereof; American Federation of Labor is also a voluntary association composed of many members unknown to the plaintiffs; John Fitzpatrick is affiliated therewith as a member, agent, director or officer; Hairdressers and Cosmetologists Local No. 548-D, holds a charter and operates under a secret agreement with Journeymen Barbers' International Union of America, Local 548 of said Union; Journeymen Barbers' International Union of America, Local 548, holds a charter and operates under secret agreement with the Journeymen Barbers' International Union of America of the America Federation of Labor; the Journeymen Barbers' International Union of America holds a charter and operates under secret agreement with American Federation of Labor; the Chicago Federation of Labor holds a charter and operates under a secret agreement with the American Federation of Labor; the American Federation of Labor has its principal office in the City of Washington, in the District of Columbia, and a branch office in [fol. 7] Chicago, Illinois; the Chicago Federation of Labor

has its principal office in the City of Chicago; Journeymen Barbers' International Union of America has its principal office in the City of Indianapolis, State of Indiana, and maintains an office in the City of Chicago, in charge of a sixth Vice-President; Local 548 of Journeymen Barbers' International Union of America has its offices in the City of Chicago; Local 548-D of the Hairdressers and Cosmetologists Union maintains its offices in the City of Chicago. By virtue of the charters and secret agreements, the Hairdressers and Cosmetologists Union, Local 548-D, and its officers, directors, members, etc. are under direct supervision of Local 548 of the Journeymen Barbers' International Union of America of the Journeymen Barbers' International Union, and its members, etc., are under direct supervision and control of the Journeymen Barbers' International Union; the Journeymen Barbers' International Union of America and the Chicago Federation of Labor are under the direct supervision and control of the American Federation of Labor.

Plaintiff, Ross W. Swing, is employer of all other plaintiffs and owner and operator of the beauty parlor operated under the trade name of Manor Beauty Salon, is the sole owner of the Manor Beauty Salon, is conducting a beauty shop wherein beauty services are rendered and cosmetics and similar articles sold to the public at 5558 West North Avenue, Chicago, Illinois; that he has expended many thousands of dollars in equipping and furnishing the place of business; also large sums of moneys for advertising, promotion and other publicity; by reason thereof he has built [fol. 8] up a valuable clientele and established a good will for his business; his place of business occupies an entire former bank building, having a frontage of 50 feet on West North Avenue and 100 feet on Central Avenue; the entrance to his place of business being on North Avenue. He employs 16 employees, all of whom have joined with him as plaintiffs in this proceeding. On April 30, 1937, defendants, Patsy Trotta, Felix Rose, N. C. Iannella and Sadie Murphy and others acting in accordance with the terms of the secret agreement with the Journeymen Barbers' International Union, Local 548 of said Union, undertook and entered upon the task of forming a beauticians' department of said Union, using the name of Hairdressers and Cosmetologists Union, Local 548-D of said Journeymen Barbers' International Union; that said Union of beauticians

was created for the purpose of organizing employees of various beauty shops in the City of Chicago and elsewhere, and to compel the employees of said beauty shops to join said Union. Patsy Trotta, Felix Rose and N. C. Iannella as Secretary and Treasurer and business agents of said Hairdressers and Cosmetologists Union, Local 548-D, during the month of April, 1937, called upon the plaintiff, Swing, and demanded that he instruct his employees to join their Union. Plaintiff, Swing, advised and informed said Secretary and Treasurer and business agents aforementioned that he had no objection to his employees joining the Union if they wished to do so; that he had no objection to said organizers discussing the matter with his employees; said Patsy Trotta, Felix Rose and N. C. Iannella and other representatives of said Union at various times and on various days and dates appeared at the shop operated by plaintiff, Swing, [fol. 9] and spoke with his employees and requested and urged them to join the Union. Plaintiff, Swing, is advised and informed that all of his employees refused to join said Union, and so informed the defendants. Plaintiff nor any of his agents, servants, etc., have done or said anything to prevent his co-plaintiffs (his employees) or any of them to join or to become affiliated with any labor union, organization or society; that so far as he knows, none of his employees are dissatisfied with the wages they are receiving for their services, the hours or any other condition of employment; he has been advised and informed and states the fact to be that his employees refuse to join the Union by reason of the following: (a) Several of his employees had on different occasions joined other similar Unions, paid their dues and fees; that these organizations lasted but a a short time thereafter and were never heard of; his employees fear that their experience with this new Union would be identical with that of their past experience; (b) his employees believe that a minimum wage law will assure them of a reasonable wage and will protect them against unreasonable working hours or conditions; that by reason thereof they see no necessity nor any advantage coming to them in joining a Union and paying dues and fees; (c) that the employees believe and stated to him that the efforts on the part of the defendants, Rose, Trotta and Iannella, to compel them to join the Union is the result of concerted action on their part and on the part of others to collect a large sum of money from them and thousands of other employees in

the beauty shop industry, which large sums of money they believe are not to be used for the advancement of the mem-
[fol. 10] bers of the Union and the betterment of their wage and working conditions, but that said money will be wasted and otherwise dissipated in payment of extravagant organizers' fees, costs of administration and in other ways not for the benefit of the members of the Union. All of plaintiff, Swing, employees are competent and efficient, and he sees no reason for discharging them because they failed to join defendant Union; he has no quarrels, disputes, differences or misunderstandings with his employees; that there never has been nor is there now any lock-out on his part or any strike existing and engaged in by his employees; that at no time during the month of April or at any time before or at the present time, is there any dispute whatsoever between him and his employees concerning terms or conditions of employment. Notwithstanding that there was no dispute between plaintiff and his employees concerning terms or conditions of employment, wages or hours, but solely because of the fact that defendants failed to accomplish their purpose and induce the employees to join their Union, the defendants, their officers, directors, members, etc., did on April 30, 1937, maliciously conspire, and as a result of the conspiracy, caused Plaintiff's place of business to be picketed by persons other than his own employees and by employees of the defendants, whose names are unknown to plaintiff. That beginning on April 30, 1937, and up to the date of the filing of this complaint and excepting a period of three weeks from June 7, 1937, to June 28, 1937, during which time the defendants were restrained by an order of the United States District Court, one and very often two, male and female pickets were and are carrying large signs with the words in large letters: "This
[fol. 11] Beauty Shop Is Unfair to Organized Labor, Hairdressers and Cosmetologists Union Local 548-D, American Federation of Labor and Chicago Federation of Labor." And said pickets carried said signs, walked up and down the sidewalk on West North Avenue, in front of plaintiff's beauty shop, during the entire day and part of the evening, when his place of business was open for business; that the statement contained on the sign carried by the pickets, to-wit: "This Beauty Shop Is Unfair to Organized Labor", is untrue and designedly false and malicious; said pickets with said signs parade in front of his place of business at

about three feet from the building line of the shop, and walk in an easterly and westerly direction, always walking against the traffic and interfering with customers of plaintiff entering and coming from his place of business.

On May 15, 1937, at 5:00 o'clock P. M. one of his customers, Florine Johnson, who had just had some beauty work done in his shop, upon leaving said shop and reaching the sidewalk in front of the shop, was accosted by a woman who was then and there picketing in front of plaintiff's shop, and whose name is unknown to plaintiff; said picket rushed forward and grabbed Miss Johnson by the arm and said to her in a threatening manner: "You better not go in there again; it's a scab shop." Whereupon, said Miss Johnson fled in fear of physical violence and bodily harm. On May 15, 1937, one of his customers, to-wit: Mrs. E. H. Keyser, after having some work done in the beauty shop, and who was leaving his premises, was accosted by two men passing in an automobile; these two men had [fol. 12] been frequenting the immediate vicinity of the curb in front of plaintiff's shop; they made the following statement to said customer in a menacing voice: "You ought to be shot for going into that scab shop." In the operation of his business, plaintiff deals with ladies, many of whom are wives, daughters and friends of members and persons affiliated with labor organizations; many of his customers are themselves members of labor organizations, or are in sympathy with organized labor; the unwarranted and unlawful acts of the defendants are misleading these people into believing that there is a strike going on in his shop and that plaintiff is unfair to his employees; the misrepresentation and false statements have resulted and will result in immeasurable loss of business and irreparable damage to plaintiff, Swing, so long as defendants continue the acts herein complained of; the nature of plaintiff's business is such that it is necessary that his employees be at all times at ease, composed and collected; the picketing of the agents of defendants is causing the employees to be nervous, ill at ease, confused in their work and the customers are in danger of being injured; the state of mind of the employees affects the quality of their work, with the result that customers have become dissatisfied, and plaintiff is losing and will lose a large number of his customers, all to his irreparable injury. The nature of his business is such that customers who once cease to patronize his beauty

shop and have services rendered to them by another beauty shop, it is difficult to regain their patronage. The defendants, under a pretext that there is a labor dispute between plaintiff and his employees, are maliciously picketing and causing his shop to be picketed; in truth and in fact there is [fol. 13] no dispute between the plaintiff, Swing, and his employees (his co-plaintiffs); defendants are picketing his place of business not for the purpose of obtaining better terms and conditions for his employees, but in furtherance of a conspiracy, malicious and ulterior motive of their own, and for the sole and only purpose and by force and intimidation to compel plaintiff and his employees to become members of their Union. Plaintiff is in no position to enforce or coerce his employees to join defendants' Union; there is no reason why plaintiff should be injured by defendants; plaintiff, Swing, has never ordered, directed, advised or suggested to his employees that they do not or should not join defendants' Union; plaintiff has no dispute with defendants or their agents; the statement appearing on the signs carried by the pickets that he is unfair to organized labor is not justified by the facts; in truth and in fact plaintiff pays his employees the prevailing wage in the City of Chicago; his employees work under superior conditions in a building considered to be one of the best equipped in the City of Chicago for the beauty shop business; the statements appearing on the sign, together with the patroling and picketing is a picketing which is intended to unlawfully interfere with plaintiff's business; plaintiff is informed and believes that there are a large number of beauty shops in the City of Chicago, many of which employ more operators than he employs, whose employees are not members of any Union; that wages and working conditions in the other shops are lower and not as good as those in his shop; that there never has been nor is there now any picketing done by these defendants or their agents in front of said other shops; plaintiff is informed and believes that because of personal ani- [fol. 14] mosity, the defendants are attempting to destroy his business, under the guise of a labor dispute, but for the benefit of his competitors. Plaintiff, Swing, has invested upwards of $15,000 in equipping his shop and in advertising; he is under great and heavy overhead expense of a fixed and permanent character; said expense can only be paid out of his business operations; a reduction in income caused by the acts of the defendants will result in his being unable

to meet his fixed expenses and he will therefore lose his business and his investment. The unlawful acts and conduct of the defendants creates a false impression and belief in the minds of the members of the public and his customers and patrons that his employees are striking because they are not fairly treated or sufficiently paid; thereby creating an antipathy and antagonism towards him on the part of the public and his customers; this is destroying his good will, causing him to lose business prestige and large sums of money, all to his injury.

Irene Boivin, Nan Chapman, *et al.* (being all of the employees and plaintiffs herein) complain as follows: They constitute all of the employees of Ross W. Swing in the beauty shop operated by him and known as the Manor Beauty Salon, at his place of business on North Avenue, in the City of Chicago; they have been employed by him for periods varying from two to eighteen months. They were engaged in their respective duties and employment on April 30, 1937; on said date, not at any time before nor since, was there any dispute between them as employees and Swing as their employer, concerning terms or conditions of employment or wages; they were satisfied with their salaries and with the hours and conditions under which [fol. 15] they worked, and are now satisfied. On April 15, 1937, Patsy Trotta, Felix Rose and N. C. Iannella, representing themselves as duly authorized organizers for the defendant Unions, appeared at the Manor Beauty Salon and talked to Ross W. Swing, their employer; they stated to him that they came for the purpose of speaking to the employees for the purpose of inducing them to join their Union; said Swing permitted them to talk and discuss the matter of joining the Union with his employees; at various times, days and dates, each and every of the employees spoke with said representatives of the Union and repeatedly told them that they had no desire to join the Union. That neither they nor their employer, Swing, had done or said anything to prevent them, or any of them, or induce them or any of them, not to join or become affiliated with any labor Union. These employee-plaintiffs never at any time had any desire to become members of or become associated with any labor union; their failure and refusal to join the Union is of their own free will and accord; they have and do now refuse to join said particular Union because of the following reasons: (a) several employees have

on different occasions joined other and similar unions which were attempted to be organized in their industry; they paid their initiation fees and dues and the organizations lasted but a short time; they were never heard of or from; that these employees fear that their experience with the defendants' Union would be identical with that of their other past experiences; (b) that these employees believe that the minimum wage law will assure them of a reasonable wage and would protect them against excessive working hours; that the minimum wage and hour regulations would give [fol. 16] them all that they could possibly expect from any Union; therefore, there is no necessity and no possible advantage to be obtained by joining a Union and paying a monthly tax which they cannot afford and from which they will receive no benefit; (c) that they verily believe and have so stated to their employer (Swing) that the efforts on the part of the organizers of the Hairdressers and Cosmetologists' Union, Local 548-D and the organizers aforementioned, is the result of a concerted action on the part of the officials of the Union to collect large amounts of money from them and the thousands of other employees in the beauty shop industry, which sums of money they believe are not to be used for the advancement for the members of the Union and the betterment of their wages and working conditions, but that said money would be wasted, consumed and dissipated in payment of extravagant organizers' fees and cost of administration, and in other ways not for the benefit of the members of the Union. These employees have not at any time asked, nor do they now ask, anyone to represent them or assist them in the matter of improving their salaries, the hours of conditions of employment with their employer; notwithstanding the fact that they have repeatedly informed the Union organizers aforementioned that they were satisfied with their employment, their wages, hours and working conditions; that they had no dispute with their employer over any question dealing with their employment; that they did not wish to join the particular labor union; that they had no desire to have the defendants or their organization act for them and make any demands on their behalf to their employer; yet these defendants and their agents, etc. on April 30, 1937, caused their [fol. 17] employer's place of business to be picketed. That since the 30th of April, 1937, and up to the filing of this

complaint, with the exception of a period of three weeks, one and very often, two pickets, both male and female, walked up and down on West North Avenue and in front of their employer's place of business during the entire day and part of the night and picketed the place of business, carrying large signs in words and large letters appearing thereon as follows: "This Beauty Shop Is Unfair to Organized Labor—Hairdressers and Cosmetologists Union Local 548-D, American Federation of Labor and Chicago Federation of Labor." The statements which appear on these signs carried by the pickets are untrue and designedly false and malicious. Said pickets carrying said signs parade in front of the place of business at distance of about three feet from the building line, walking against the traffic and interfering with the customers of the beauty shop, entering and leaving said place of business. In said business, they serve ladies, many of whom are wives and daughters and friends of men affiliated with labor unions; many of their patrons are themselves members of labor organizations; many others sympathize with organized labor. The unwarranted and unlawful acts of the defendants are misleading their customers and the public, in that they are led to believe that there is a strike of employees going on and that their employer is unfair to his employees; in truth and in fact their employer is not unfair and has no quarrel with organized labor or any other labor, and has never been unfair to organized labor; there is no strike insofar as they (Swing's employees) are concerned. Such representations and false statements have and will result [fol. 18] in a loss of patronage, all to their and their employer's damage and loss; that the employees state that by reason of these unlawful acts they have lost and will continue to lose salaries and other emoluments which they have heretofore received. During their employment the employees have built up a clientele of their own; this clientele is of great value to them and to their employer; the nature of their work requires that they should at all times be at ease and composed. Any disturbance of their peace of mind reflects in their work and makes it impossible for them to render satisfactory service; this causes dissatisfied customers and they have lost customers and patronage and a continuance of the picket line will continue to cause them to lose their clientele and their employment; this is their

only source of income. The picket line continues up and down in front of the doors and windows of the shop and they, by reason thereof, have become upset and mentally disturbed. When they arrive at their place of employment in the morning, these pickets gaze at them in a threatening manner; when they go to lunch and return, they are again met with these threatening stares; when they leave their place of employment at the end of the day, they are again faced each day with the same pickets who bear the same threatening attitude. During the day men are constantly parked in automobiles at or near the windows of the beauty shop; towards evening and when the shop is about to close a number of men congregate near the entrance to the shop; the result is that they are constantly in fear of violence and are in fear of leaving their place of business and homes at night. The defendants have conspired between themselves to injure them and their employer, and are using as a means to further the conspiracy the untruth-[fol. 19] ful pretext that there is a labor dispute between the plaintiff and his employees; that as a result of said conspiracy they have and will continue to cause, if permitted to continue, irreparable damage to them and their employer. That it is the intention of the defendants to continue the picketing, threats, intimidating, following, threatening until they and their employer yield to this force against their will, and until they all agree to join the Union and pay dues, or until their employer is compelled to close his business and they will lose their jobs. All of the plaintiffs state: That in the rendition of services to their patrons there is a constant need of large quantities of hot water; up to April 30, 1937, there was at all times available an ample supply of hot water; since April 30, 1937, the supply of hot water has become greatly diminished and at times has completely stopped. Upon making complaint to the engineer or janitor in charge of the building, they were advised that the inability to supply hot water was due to the failure of the hot water apparatus to function properly. Owner plaintiff's conclusion is, that the hot water apparatus was in good condition and the inability to supply was due entirely to deliberate acts of the engineer in failing to properly adjust hot water apparatus and to provide adequate supply of fuel under boiler. Plaintiffs charge that the engineer is part and parcel of the conspiracy and is a party

thereto, and that this conduct of the engineer is made in concert with the defendants and in and about their unlawful acts. In and about the operation of the business there is a constant need of towels; prior to April 30, 1937, plaintiff (Swing) had entered into a contract with the Elston Laundry to furnish these towels; prior to April 30, 1937, business has been furnished with ample and sufficient towels [fol. 20] to meet the requirements. Since said picketing and up to the present time the supply of towels has been inadequate, without any reasonable excuse. Upon inquiry being made to the driver of said Laundry Company truck, delivering towels, untruthful statements have been made, evasions have been resorted to, but the supply has not been delivered. Plaintiffs charge that the agents and servants of the Elston Laundry Company have entered into some arrangement or conspiracy with the principal defendants for the purpose of coercing all of the plaintiffs into joining the labor union. Plaintiff (Swing) charges that his right to conduct his business without interference from outsiders is a property right; his right to employ labor without interference is also a property right. Conspiracy charged herein and the acts and conduct of the defendants complained of, deprive plaintiff of his property without due process of law, contrary to paragraph 2 of Article 2 of the Constitution of the State of Illinois and the Fifth Amendment to the Constitution of the United States; also the Fourteenth Amendment to the Constitution of the United States. The righ to freely contract on the part of employees and without interference is guaranteed by the Constitution of the State of Illinois and the above Amendments to the Constitution of the United States. The defendants and those assisting and aiding them are financially irresponsible and damages cannot be collected; actions for damages cannot be brought to trial for a long time, during which time plaintiff will be subjected to the interference herein set forth and his business will be destroyed. The acts complained of will continue unless enjoined; plaintiffs have no adequate remedy at law, and unless enjoined by this court plaintiff will suffer irreparable damage. Bill prays that the defendants [fol. 21] (naming them) may be required to answer, answer under oath being waived. That temporary and permanent injunction issue; restraining the defendants, their agents, etc.

(1) from picketing or maintaining any picket or pickets at or near plaintiff's (Swing) place of business, or along routes used by persons in going to and from same;

(2) from patrolling or congregating in front of or in vicinity of plaintiff's place of business, in vehicles or on foot, in furtherance of such picketing;

(3) from assaulting, menacing, intimidating, threatening or harrassing, by act or attitude, any person or persons going to and from plaintiff's business;

(4) from calling or addres-ing any epithets or offensive language to plaintiffs or other persons;

(5) from following plaintiffs for the purpose or with the effect of molesting or intimidating plaintiffs;

(6) from calling at homes of plaintiffs for the purpose or with the effect of molesting or intimidating them or their families;

(7) from exhibiting or displaying any sign or placard in front of or in the vicinity of plaintiff's business, designating or characterizing plaintiffs as unfair to organized labor or by any other means designed to induce or influence persons not to deal with plaintiffs;

(8) from injuring or attempting to injure plaintiff's business;

[fol. 22] (9) from advising, encouraging or assisting in any of the things herein forbidden;

and for such other and further relief as equity may require, etc.

Prayer for summons.

Bill is signed by all plaintiffs and contains affidavit of Ross W. Swing and Margaret Kessel as plaintiffs and duly authorized agents of other plaintiffs, stating that bill of complaint is true.

* * * * * * *

INJUNCTIONAL ORDER

Injunctional order entered by Judge Feinberg July 17, 1937, as follows: That cause came on to be heard on motion of plaintiffs' attorney for temporary injunction, on

July 9, 1937, that all of the defendants were given due notice; that the court read the sworn bill of complaint and heard arguments of counsel representing plaintiffs and defendants; it is ordered that on plaintiffs' filing a bond in the sum of $1,000 to be approved by the court, that a writ of injunction issue, restraining and enjoining the defendants (naming them) from:

(a) Picketing or maintaining any picket or pickets at or near the place of business of plaintiff (Swing) at 5558 West North Ave.

[fol. 23] (b) Patrolling or congregating in front or in the vicinity of plaintiff's business, in furtherance of picketing;

(c) Exhibiting or causing to be exhibited any sign or placard or other matter in front of or in the vicinity of plaintiff's business, designating the plaintiff's business as being nonunion or unfair to organized labor, or as refusing to permit collective bargaining, or designed to induce or influence persons not to enter plaintiff's place of business;

(d) Soliciting, inducing or influencing or attempting to induce or influence persons, employees or prospective employees of plaintiff not to enter his place of business or do business with him;

(e) Menacing, intimidating, threatening or harrassing persons employed by or persons going to and from plaintiff's place of business; from calling plaintiff and members of plaintiff's family and plaintiff's employees vile names and shouting offensive epithets;

(f) Threatening, coercing, intimidating or assaulting the employees of the plaintiff or harrassing the employees of the plaintiff, while on their way to and from their homes to the place of business;

(g) Threatening, coercing, intimidating or assaulting prospective employees, or persons seeking employment from the plaintiff, and from preventing by threats, coercion or intimidation, such prospective employees and persons seeking employment, from entering plaintiff's place of business;

[fol. 24] (h) Advising, encouraging or assisting or participating in the doing of any of the things herein forbidden.

* * * * * * *

ORDER DENYING MOTION TO STRIKE

Order January 17, 1938, denying plaintiffs' motion to strike answers and setting motion to dissolve injunction for argument January 19, 1938.

ORDER DISSOLVING INJUNCTION, ETC.

Order entered January 20, 1938, as follows: Cause coming on to be heard on motion of defendants, Journeymen Barbers International Union of America, Local 548 Journeymen Barbers' Union and Frank Rango etc., also Hairdressers and Cosmetologists' Union, Local 548-D; Patsy Trotta, individually and as officer of Union; Sadie Murphy, [fol. 25] Felix Rose and N. C. Iannella, individually and as officers of Union, to dissolve injunction entered against them, and to dismiss the above cause for want of equity on face of complaint, and for leave to file their written suggestions of damages instanter. The court having jurisdiction of the subject matter and the parties and having heard arguments of course, it is ordered: that the injunction is dissolved; that the complaint is stricken for want of equity on its face; the defendants are given leave to file written suggestions of damages instanter; that the cause is set for hearing on February 14, 1938, for the purpose of hearing evidence and assessing damages. Plaintiff is given leave to file an amended complaint within 20 days; defendants to plead within 20 days thereafter.

* * * * * * *

[fol. 26] ORDER DISMISSING CAUSE

Order entered February 15, 1938; recites: cause came on to be heard on suggestion of damages filed by Journeymen Barbers' International Union Local 548 of Journeymen Barbers' International Union, and Local 548D of Hairdressers and Cosmetologists' Union; and the court having heard arguments of counsel and having heard evidence in open court, finds: (1) the court had jurisdiction of the parties and subject matter; (2) that on July 17, 1937, temporary injunction issued against the above moving parties (defendants); (3) that on motion of said defendants the

temporary injunction was dissolved on January 20, 1938; (4) that the equities are in all respects with the defendants; (5) that the above defendants are as a matter of law entitled to damages for the wrongful issuance of the temporary injunction; that they have been damaged by the plaintiffs to the extent of being obligated to pay and having paid out sums of money to Stanton & Stanton for legal services necessarily rendered in connection with the dissolution of said temporary injunction; (6) that the reasonable value of the legal services rendered as detailed by testimony heard before me this date in behalf of Journeymen Barbers' International Union of America and Local 548 of said Union, is $466.67; in behalf of Local 548-D of Hairdressers and Cosmetologists' Union is $233.33; (7) it is ordered that defendants, Journeymen Barbers' International Union and Local 548 of said Union, and Hairdressers and Cosmetologists' Union, Local 548-D, are entitled to damages from plaintiff by reason of the wrongful issuance of the injunction, in the amount set forth; (8) it is further ordered that the above defendants shall be [fol. 27] paid by plaintiffs the total sum of $700.00, and in default of payment, that execution issue; (9) plaintiffs having failed to file an amended complaint within 20 days from January 20, 1938, as per order entered on said date, and the court being advised by attorneys for the plaintiff that plaintiffs will not file an amended complaint, but elect to stand by their original complaint stricken on January 28, 1938, for want of equity on its face, it is therefore ordered that the above cause be and the same is hereby dismissed at plaintiffs' costs as of this date.

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[fol. 28] ANSWER OF JURISDICTIONAL BARBERS INTERNATIONAL UNION

Sworn answer filed July 27, 1937, by Journeymen Barbers International Union of America, referred to as International Union, Journeymen Barbers International Union of America, Chicago Local 548, referred to as Local 548, and Frank Rango, etc., to complaint sets forth: that said International Union is voluntary, unincorporated, non-profit, non-stock labor association composed of different barber, hair-dresser

and cosmetologist local unions represented by delegates elected to International Union; that said local unions are formed for purpose of engaging in collective bargaining as to hours, wages and conditions of employment on behalf of respective members, secure them employment and trade recognition for said unions. Said local unions are independent of one another, autonomous in nature and have sole and exclusive control over all their respective local affairs; Local 548 is voluntary, unincorporated non-profit, non-stock labor union; Frank Rango is Sixth Vice-President of International Union and Secretary Treasurer of Local 548; defendants have no knowledge, information or belief upon which to predicate answer as to averments in paragraphs 1, 2, 4, 11 to 17, 20 to 30, 32 to 42, 44 to 48, 50 to 78, all inclusive, 81, 82, 84, 86, 87, and 90 of com-
[fol. 29] plaint, except as set forth in their answer, as to: ownership, location or nature of Manor Beauty Salon; persons employed therein; patrons thereof; undertakings, efforts, or activities of any of other defendants, or effects thereof; dealings or relationships of plaintiff Swing with any of defendants, or others; abilities, relationships, wishes, desires or earning capacities of employed plaintiffs, or the hot water or towel situations or circumstances; and states that Hairdressers and Cosmetologists Union, Local 548D, referred to as Local 548D, is voluntary, unincorporated labor union, Patsy Trotta, Sadie Murphy, Felix Rose and N. C. Ianella are affiliated with Local 548D only, Local 548 is chartered by International Union; denies that Local 548 operates under any secret agreement with International Union, but pursuant to its constitution, which grants it local independence, and pursuant to its own constitution and by-laws; International Union is chartered by American Federation of Labor, referred to as the A. F. of L., but does not operate under any secret agreement with said A. F. of L.; but as independent, chartered, International Union, pursuant to its constitution, which is open to public for examination.

That they believe the A. F. of L. has its principal offices in Washington, D. C. and branch in Chicago; principal office of Chicago Federation of Labor, referred to as the C. F. of L. is 666 Lake Shore Drive, Chicago; principal office of International Union is Indianapolis, with local office and Sixth Vice-President representative at 100 N. La Salle Street, Chicago; Local 548 offices at 100 N. La Salle Street,

Chicago, and Local 548D at Hotel La Salle, Chicago; Local [fol. 30] 548D is not under supervision of Local 548, and Local 548 is not under supervision of International Union, nor is International Union under supervision of A. F. of L.; Local 548 is affiliated but not in any way controlled by C. F. of L.; Frank Rango's only affiliation is as Sixth Vice-President of International Union and as Secretary-Treasurer of Local 548; none of other individual defendants have any affiliation with the International Union nor Local 548; neither International Union, Local 548 nor any officer or representative of International Union or Local 548 participated or assisted in things complained of against Local 548D or its representatives and agents, nor have they knowledge of said things or acts; whatever activities 548D is engaged in are of own private volition; Patsy Trotta, Sadie Murphy, Felix Rose and N. C. Ianella are not business agents of International Union nor Local 548, but representatives of Local 548D only; that these defendants deny they engaged in conspiracy or caused or participated in picketing, deny engaging or being associated in action of any sort against plaintiffs; deny they are engaged in activities against plaintiffs; deny animosity against Swing and that they are attempting to destroy his business and state that *that* only since Swing recently brought himself to their attention, did they formulate thought and belief, predicated upon his statements and actions, that he is unfair to union labor and is attempting to conceal anti-social and anti-union activities behind petticoats of employees, dominated, coerced, intimidated and controlled by him; and deny each and every material allegation in complaint charged against them. Prayer for dismissal of complaint and verification.

[fol. 31] Answer of Hairdressers and Cosmetologists Union

Sworn answer of Hairdressers and Cosmetologists Union, Local 548D, Patsy Trotta, Sadie Murphy, Felix Rose and N. C. Ianella, filed August 26, 1937, sets forth: that American Federation of Labor is voluntary, unincorporated, non-profit, non-stock trade and labor association composed of different national and international trade and labor unions represented therein by delegates elected thereto; said trade and labor unions are likewise unincorporated, non-profit,

non-stock associations, composed of local unions represented therein by delegates elected by local unions to international, which local unions are likewise unincorporated, non-profit and non-stock associations; object of the A. F. of L. in part is to encourage formation of local trade and labor unions, based upon a strict recognition of autonomy of said unions, closer federation of such societies through organization of central trade and labor unions in every city, and promotion and advancement of such bodies.

Journeymen Barbers International Union of America, is a voluntary, unincorporated, non-profit, non-stock labor association composed of many barber and cosmetologist local unions throughout United States and Canada, which local unions are represented therein by delegates elected by them to International Union; among said International Union locals are Journeymen Barbers International Union of America, Chicago Local 548, sometimes referred to as Barbers Union, and Hairdressers and Cosmetologists Union, Local 548D, sometimes referred to as Cosmetologists Union; all said local unions are formed for purpose, among other things, of engaging in collective bargaining as to hours, [fol. 32] wages and conditions of employment in behalf of respective members, to secure employment for memberships and recognition of said unions; the Chicago Federation of Labor is a voluntary, unincorporated, non-profit, non-stock central trade and labor association composed of delegates elected thereto by local unions in Chicago; said International Union is chartered by A. F. of L.; said Barbers and Cosmetologists Unions are chartered by said International Union and are affiliated with C. F. of L. which is affiliated with A. F. of L.; said Barbers and Cosmetologists Unions are independent of one another, autonomous in nature and action and have sole and exclusive jurisdiction and control over their respective local affairs.

Frank Rango is Sixth Vice-President of International Union and Secretary-Treasurer of Local 548; Patsy Trotta is Secretary-Treasurer, Sadie Murphy is President and Felix Rose and N. C. Ianella are representatives of Local 548D only. Defendants deny that International Union operates under a secret agreement with A. F. of L.; that Barbers or Cosmetologists Unions operate under any secret agreements between themselves or with International Union; that said C. F. of L. operates under secret agreement with A. F. of L.; and state that Barbers and Cosmetologists

Unions operate pursuant to said International Union's Constitution and By-Laws which recognize their absolute autonomy and local independence of action, and pursuant to their own respective Constitution and By-Laws, and that said International Union operates as an independent, autonomous, chartered International Union pursuant to its own [fol. 33] constitution and by-laws, which are open to public inspection; said Cosmetologists Union, its officers, directors and members are not under supervision or control of Barbers Union nor is Barbers Union, its officers, directors or members under supervision or control of International Union, nor is International Union nor said C. F. of L. under supervision or control of A. F. of L.; said Barbers Union and Cosmetologists Union are affiliated with, but not in any way controlled by C. F. of L.; they believe Swing is owner of Manor Beauty Salon in Chicago; that the plaintiff employees constitute all his employees in said shop; that A. F. of L. has principal office in Washington, D. C., and branch in Chicago; that C. F. of L. has principal office at 666 Lake Shore Drive, Chicago; that International Union has principal offices in Indianapolis with local office and Sixth Vice-President representative at 100 N. La Salle Street, Chicago; that Local 548 has office at 100 N. La Salle Street, Chicago; that Local 548D has its office in Room 215, Hotel LaSalle, Chicago; that Swing has carried on beauty shop business for more than one year at 5558 W. North Avenue, Chicago; that said employees have been for some time employed by him; that he occupies entire former bank building about 50 x 100 feet and has invested upward of $15,000 in building, equipment, furnishing and advertising said place.

Defendants have no knowledge or belief upon which to predicate answer as to averments that Swing built up and created a valuable clientele and good will of great volume and deny any injury done his employees and that they voluntarily joined him in filing this complaint; state that said Cosmetologists Union was chartered January 20, 1937, for [fol. 34] union purposes and not to compel employees of beauty shops to join it; that it was many times requested and was induced by Swing, shortly after its inception, to unionize beauty shops in Austin, Chicago, Illinois, being community wherein his shop is located, for purpose, as he put it, of stabilizing conditions in said community; that he offered to financially assist and compensate said Union in and for such activities and agreed to unionize his shop as

soon as said Union proved itself by organizing fifty per cent of beauty operator employed in said community, and agreed to cooperate in stabilization of conditions in beauty culture industry in said community. Said Union refused said financial assistance and compensation but agreed to undertake unionizing of beauty shop operators in Austin and to bring about stabilization of conditions in beauty trade in said community, pursuant to said Swing's request and agreement to unionize his shop and cooperate in stabilization as aforesaid. In said Austin community are employed approximately 200 beauty shop operators of whom over ninety per cent are members in good standing of the Cosmetologists Union. Upon unionization of said operators, said Union succeeded in bringing about recognition of said Union by, and a spirit of friendly cooperation with and among beauty shop owners in community. Said owners, upon Union's assurance that Swing would unionize his shop and cooperate with them proceeded to stabilize prices, hours, working conditions and wages to end that price wars to attract volume business were to be eliminated; service was not to be rendered public below minimum prices within the reach of vast majority of people—at cost plus reasonable profit on return [fol. 35] of said owners' respective investments which prices were arrived at after scientific survey of conditions in industry to enable owners to comply with minimum wage and maximum hour laws for women of Illinois; to enter into fair wage agreements with employees and thus avoid and preclude strikes, and eliminate wilful and unfair trade practices then prevailing in industry in said community which have effect of unsettling and depressing profession in Austin, none of foregoing being for purpose of establishing a trade monopoly; that thereupon Swing was called upon to carry out his agreement aforesaid. Swing then requested aforesaid Cosmetologists Union officials that they maintain prices they succeeded in having all other beauty shop owners in said community set, as aforesaid, as minimum prices to October 1, 1937, and to permit Swing during said period to operate his shop at prices below said minimum prices; and offered to pay said Union's representative $500 if they would bring about such condition, which request and offer was refused by these defendants. Said Ross W. Swing never permitted said Cosmetologists Union representatives to see employees, saying he himself would see to it that they were unionized as aforesaid. Neither Trotta, Rose, Ianella

or any other Union representative spoke with Swing's employees. They never refused to join said Union but Swing prohibited them joining. His employees are dissatisfied with wages and conditions of employment; that Swing advised them if they permitted him to fix up things for them, their incomes would be increased and competitive shops destroyed; that if they joined Cosmetologists Union without his consent, they would be discharged; that by reason of [fol. 36] dishonest and fraudulent methods and inducements of Swing in respect to matter in which alleged redress is sought by plaintiffs, said defendants are greatly injured in that their relations with all other beauty shop owners and operators in Austin are seriously affected; that employees of said Swing, in violation of minimum-wage and maximum hour law, aforesaid, which provides for $16.50 per week minimum and forty-eight hours maximum, are employed strictly on commission basis and work approximately sixty hours each per week, whereas said Cosmetologists Union requirements provide for guaranteed weekly minimum wage above that set pursuant to Illinois Minimum Wage Law for Women and Minors, in force July 1, 1933, and for eight hour day, pursuant to the Women's Eight Hour Law, effective July 1, 1937; that in order to effectuate their purpose, it is necessary for said Union to have as many as may be in same trade in same community united because in competition between employers they are bound to be affected by standard of wages and hours of employment of their trade in neighborhood.

It is necessary for Cosmetologists Union to be interested in wages of those not members of said Union and in conditions under which they work as in its own members because of influence of one upon other. All engaged in trade are affected by prevailing rates of wages and hours of employment. Economic organization is not based on single shop. Collective bargaining can only be maintained if union conditions prevail not only in some single shop, but generally. That they deny: that any of said Swing employees ever joined other Unions similar to Local 548D, or that [fols. 37-57] they believe minimum wage law will assure them reasonable wage and maximum hours, or that said employees believe or ever stated to Swing that efforts of Trotta, Rose and Iannella are not for interest of Union workers in trade; that said Swing made said averments pursuant to his trickery and fraud upon said Union and

pursuant to his plan to smother competition and gain undue advantage to himself. They don't know as to competency of his employees, do not seek their discharge but their unionization for protection and betterment of conditions for all employees in trade. Swing has ordered his employees not to join said Union; that there does exist a dispute with Swing pertaining to terms and conditions of employment in that by reason of a community of economic interest in Austin, in the beauty culture industry, as aforesaid, it is essential for welfare of Cosmetologists Union that employees of Swing be unionized and paid scale of wages and work hours commensurate with those of other employees in profession; that these defendants never had more than one picket in front of or in vicinity of his shop. Statement on the sign of said picket read: "This Beauty Shop refuses to deal with Hairdressers & Cosmetologists Union, Local 548D, American Federation of Labor and Chicago Federation of Labor," and not as averred, which publication is true and correct. Defendants never interfered with or addressed any customers in any way, and deny anyone ever rushed and grabbed any customer by the arm, or threatened or menaced one; and deny any malicious or ulterior motive against plaintiffs; and each and every material allegation in complaint charged against them or any of them. Prayer for dismissal of complaint, and verification.

* * * * * * *

[fols. 58-63] CERTIFICATE OF CLERK

Certificate of John E. Conroy, Clerk of Circuit Court of Cook County, dated April 22, 1938, that above and foregoing transcript of record, etc., is true, perfect and complete transcript according to praecipe filed March 5, 1938, and additional record as per praecipe filed March 8, 1938.

[fol. 64] IN APPELLATE COURT OF ILLINOIS

Abstract of Record

JUDGMENT

Appellate Court judgment December 21, 1938, that there is error in nisi prius court orders of January 20 and Febru-

ary 15, 1938, and ordering same reversed, annulled, and set aside, and taxing costs against appellees.

ORDER CERTIFYING CAUSE TO SUPREME COURT

Order January 9, 1939, certifying that cause involves questions of law of such importance on account of principal and collateral interests involved as that it should be passed upon by Supreme Court, and granting appellees leave to appeal to Supreme Court conditioned on filing appeal bond in sum of $250 within ten days.

[fols. 65-67] CLERK'S CERTIFICATE

Certificate of Sheldon W. Govier, Appellate Court Clerk of First District of Illinois, dated January 17, 1939, that foregoing transcript is a true copy of the final order, judgment and all other proceedings and appeal bond of Appellate Court.

[fol. 68] IN SUPREME COURT OF ILLINOIS

Docket No. 25083—Agenda 14—April, 1939

Ross W. SWING et al., Appellees,

v.

THE AMERICAN FEDERATION OF LABOR et al., Appellants

OPINION—Filed June 19, 1939

Mr. Justice SHAW delivered the opinion of the court:

The plaintiffs in this cause are the owner and all of the employees who are jointly conducting a beauty parlor in the city of Chicago, and the cause of their complaint for an injunction arises from interference with that business by the defendants. There is no question of fact for decision as the cause was disposed of on a motion to strike which admitted all facts well pleaded. In the circuit court the motion to dismiss was sustained and the complaint dis-

missed for want of equity. The Appellate Court reversed this judgment of the circuit court and granted a certificate of importance, permitting the cause to come before us on this further appeal.

The facts alleged and admitted are substantially as follows: April 30, 1937, four persons claiming to be officials and business agents of Local No. 548-D of the Hairdressers and Cosmetologists Union called upon Swing and demanded that he require all of his employees to join that union, to which none of them belonged, and to which none of them wished to belong. Swing took a neutral position in the matter, permitted the agents to mingle with his employees, and permitted the employees to do as they pleased. The plaintiffs all agree that there was not then and has not since been any labor difficulty or dispute; the employees were and are satisfied with wages, hours and working conditions.

Notwithstanding these satisfactory conditions and obvious harmony among the plaintiffs, the place of business where they all obtained a livelihood was beset by pickets. On April 30, 1937, male and female pickets appeared on the street in front of the shop carrying large signs with the legend: "This Beauty Shop is Unfair to Organized Labor, Hairdressers and Cosmetologists Union Local 548-D, American Federation of Labor and Chicago Federation of Labor." This was continued during that part of the day and evening when the place was open for business. The complaint charges that the statement on these signs was untrue and malicious, and although, as to malice, this is a conclusion of the pleader, the very fact that the employer and all of his employees joined in this suit sufficiently establishes it.

It is further charged and admitted that these pickets directly, and in some cases forcibly interfered with customers; that one lady leaving the shop was grabbed by the arm and in a threatening manner told that she had better not go in the place again because it was a "scab" shop; that another lady customer was likewise accosted and told that she ought to be shot for going into that "scab" shop. It is also charged and admitted that all of these pickets were strangers to the employer, that none of them were either past or prospective employees in the place of business and that the entire proceeding was designed and intended to force the employer to force his employees to join that particular union, or in the alternative suffer a destruction of

his business, with a consequent loss of employment and means of livelihood to all of the plaintiffs. The Appellate Court succinctly states: "The question presented for determination is whether a labor union, in which none of its members are present, past or expectant employees of an employer, has a right to picket his place of business for the purpose of compelling the employees, who do not wish to join a union, to do so."

The appellants divide their brief into two main contentions, only one of which requires consideration in this opinion. The first point which they urge, that the Illinois Anti-Injunction act of 1925 prohibits the issuance of injunctions in a case such as this, was fully considered and decided by us in Meadowmoor Dairies, Inc. v. Milk Wagon Drivers' Union of Chicago, No. 753, (No. 24890). The opinion in that case was filed while the present appeal was pending and in it we held the act of 1925 has no application to cases wherein there is no dispute between employer and employee. In that case all of the arguments presented by the appellants in this case were fully considered and it is now unnecessary for us to repeat what we then said.

[fol. 69] The second contention of the appellants concerns the constitutional right to freedom of speech. It is contended by them that section 4 of article 2 of the constitution of Illinois and the fourteenth amendment to the constitution of the United States protect them in their exhibition of the placards and signs derogatory to the plaintiffs' business and intended to destroy it. It is said that for such a wrong, if it be a wrong, or if the statements be untrue, the remedy must be by civil action or by prosecution for criminal libel. The implication of this argument is that the constitutional guaranty of freedom of speech extends so far as to make it a guaranty of freedom to libel; that under this constitutional provision those other provisions guaranteeing due process and equal protection of law must be submerged. Our liberties and means of livelihood are not held by so slender a thread nor a title so tenuous. The right of one group to organize for the advancement of its own ends is exactly equal to but no greater than the right of other citizens peaceably to pursue their own lawful occupations. In the case before us the public is told that the employer is unfair to organized labor, when the contrary is the fact, it being admitted that he is entirely willing to have his employees organize if they wish. The plaintiffs, both em-

ployer and employees, under the equal protection of the law, are entitled freely to pursue their lawful business, yet it is claimed that that business may be destroyed by a libelous boycott in the name of freedom of speech. Under the basic principles of due process a person may not be punished nor his property and business destroyed without a day in court on proper charge and notice with an opportunity to be heard. Yet it is here contended a self-organized group may determine that the plaintiffs may no longer be permitted to earn an honest living by lawful means and forthwith proceed by libelous banners to execute their death sentence.

Appellants insist that the case of Vulcan Detinning Co. v. St. Clair, 315 Ill. 40, sustains their position in regard to freedom of speech, but except for certain language in the opinion which might appear favorable to them, it is far from the point. In that case an injunction was issued in connection with a labor controversy restraining the use of certain violence and threats. No appeal was taken from the decree granting this injunction and it became final. Thereafter an article was published in a newspaper and signed by the union which was deemed to be a violation of the injunction previously granted. In this court only two things were held: (1) That no appeal having been taken from the order granting the injunction it became final and we were not at liberty to consider or decide the propriety of its having been issued, and (2) that the publication did not, in fact, violate the injunction. No further discussion of the case is necessary or appropriate.

It is unnecessary for us to decide whether or not a court of equity will enjoin a threatened libel because that kind of a case is not before us. We have here for consideration an accomplished and continuing libel which is quite a different thing, and we fail to see that it is in any way different from any other form of continuing trespass. To say that a court of equity lies supine before such a wrong where there is obviously no adequate remedy at law is to deny to equity its most fundamental and essential power—the power to right that which is wrong and protect that which must otherwise be unlawfully destroyed.

In the Meadowmoor case, supra, we pointed out that all constitutional rights are co-equal and must be harmonized with each other, no one such right being permitted to override or submerge another. What we then said we now

adhere to and the rules then announced apply to freedom of speech as well as any other constitutional right. In People v. Lloyd, 304 Ill. 23, we called attention to the fact that there is a wide difference between freedom of speech and an unbridled license of speech. We now say that freedom of speech does not include freedom to libel or slander. There is no theory upon which the constitution can be shaped into a mantle for wrong and where the right and wrong of the matter are plainly apparent the right must prevail and the wrong be prevented. It is right for men to earn their living by honest means within the law and it is wrong for others either singly or in combination to prevent such honest labor by any unlawful means whether it be force, violence or libel. These principles are self-evident [fol. 70] and require neither stress of words nor citation of authority for their support.

We have before us in this case an effort by force to deprive all of the plaintiffs of their means of livelihood and compel them to exist on terms prescribed by others without lawful authority to prescribe them. We have in this record two instances of direct force applied to customers. We have the force of threats and the supposedly powerful force of a boycott to be brought about by signs and banners. A State or nation ceases to be sovereign if it tolerates within it any force other than its own, and that force must be such as is established by law, directed by the courts, observing the principles of due process and equal protection of the law. To whatever extent these rules are violated we have lawlessness and under such circumstances a court of equity will not pick and choose among the unlawful acts and threats but will enjoin the whole scheme.

We are convinced that the Appellate Court arrived at a correct decision and its judgment is affirmed.

Judgment affirmed.

CONCURRING OPINION

Mr. Justice STONE, specially concurring:

I agree with the conclusion reached in this opinion but not with all that is said therein.

CONCURRING OPINION

Mr. Justice JONES, also specially concurring:

I agree with the result reached in this opinion. I cannot agree with the harshness of the criticisms. The facts do not warrant such severity.

Mr. Justice FARTHING, dissenting.

[fol. 71] IN SUPREME COURT OF ILLINOIS

Docket No. 25083. Agenda 14. April, 1939

Ross W. SWING et al., Appellees,

v.

THE AMERICAN FEDERATION OF LABOR et al., Appellants

DISSENTING OPINION

Mr. Justice FATHING, dissenting:

Contrary to the intimation in the majority opinion, this case does not involve the question of restraining violence. Appellants admit that an injunction against violence is proper. The sole issue is whether the circuit court erred in enjoining peaceful picketing. The fact that violence has occurred along with picketing is no reason for enjoining further peaceful picketing. In Fenske Bros. v. Upholsters Union, 358 Ill. 239, at pages 259, 260, we said: "We come, now, to a consideration of the action of the chancellor in restraining the acts sanctioned by the statute, and in particular the suggestions of appellants in their answer to the bill. Inasmuch as the act is not unconstitutional, it necessarily follows that the chancellor erred in restraining the doing of any of the things sanctioned therein. In addition to the things enumerated in the statute, the answer suggested that the decree ought to provide that nothing therein contained shall be construed to restrain defendant unions from assigning two of their members or representatives to be, peaceably and without threats or intimidation, upon the public thoroughfares adjacent to the respective places of business of complainants for the purpose of carrying signs

or placards announcing the strike and that the complainants are not employing union labor. Evidently it is impracticable for the legislature to prescribe in detail what constitutes peaceable persuasion. The power to determine whether or not acts complained of are within the terms of the statute was properly left in the courts. * * * It may well be said that the carrying of placards containing threats, malicious, abusive or designedly false statements is anything but peaceable persuasion. It may also be said that signs containing no such statements may be carried so offensively or with such annoyance as to amount to intimidation and thus be unlawful. On the other hand, carrying signs merely announcing the strike and that an employer is not employing union labor, with the single purpose of securing accessions to the ranks of a union, may be wholly peaceable persuasion. If not unlawful it may not be restrained. * * * The mere fact that acts of violence had been previously committed would of itself furnish no justification for enjoining legal acts of peaceable persuasion."

The decision in this case should depend on the answer to two questions: (1) Does the Illinois Anti-Injunction act (Ill. Rev. Stat. 1937, chap. 48, par. 2a) prevent the issuance of an injunction against peaceful picketing where there is no employer-employee relationship? (2) If it does, is it constitutional? There is no doubt about the answer to the second question. The Norris-LaGuardia act, (29 U. S. C. A. secs. 101-115, Supp. 1938,) which specifically provides that no employer-employee relationship need exist, has been upheld. (Lauf v. Shinner Co. 303 U. S. 323; New Negro Alliance v. Sanitary Grocery, id. 552.) The Wisconsin statute, which is similar to the Norris-LaGuardia act, has also been held constitutional. (Senn. v. Tile Layers' Union, 301 U. S. 468.) In the Senn case the United States Supreme Court said: "The unions acted, and had the right to act as they did, to protect the interests of their members against the harmful effect upon them of Senn's action. Compare American Steel Foundries v. Tri-City Central Trades Council, supra, 257 U. S. 184, 208, 209, 42 Sup. Ct. 72, 78, 66 L. ed. 189, 27 A. L. R. 360. Because his action was harmful, the fact that none of Senn's employees was a union member, or sought the union's aid, is immaterial. * * * There is nothing in the Federal constitution which forbids unions from competing with non-union concerns for customers by means of picketing as freely as one merchant competes with

another by means of advertisements in the press, by circulars, or by his window display. Each member of the unions, as well as Senn, has the right to strive to earn his living. Senn seeks to do so through the exercise of his individual skill and planning. The union members seek to do so through combination. Earning a living is dependent upon securing work; and securing work is dependent upon public favor. To win the patronage of the public each may strive by legal means. Exercising its police power, Wisconsin has declared that in a labor dispute peaceful picketing and truthful publicity are means legal for unions. It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connec- [fol. 72] tions, is not an invasion of the liberty guaranteed by the constitution. * * * It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the constitution. And the diversion of it to a competitor is not an invasion of a constitutional right."

The chief dispute centers around the question whether the Illinois Anti-Injunction act applies only to cases where an employer-employee relationship exists. As determinative of this issue the majority opinion relies alone on Meadowmoor Dairies Inc. v. Milk Wagon Drivers' Union, 371 Ill. 377. That case held that the Illinois statute was patterned after section 20 of the Clayton act (29 U. S. C. A. sec. 52) which had been construed to be inapplicable where there was no dispute between employer and employee. However, even a casual examination of the two statutes shows a material difference. Section 20 of the Clayton act reads: "That no restraining order or injunction shall be granted by any court of the United States, or a judge or judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment," etc. The Illinois act provides: "No restraining order or injunction shall be granted by any court of this State, or by a judge or judges thereof in any case invovling or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons, either singly or in concert * * * from

peaceably and without threats or intimidation being upon any public street, or thoroughfare or highway for the purpose of obtaining or communicating information," etc. The United States Supreme Court, in Duplex Printing Press Co. v. Deering, 254 U. S. 443, held that the words "in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment" required the existence of an employment relationship. It is significant that the Illinois legislature when it enacted the Anti-Injunction act, eleven years after the passage of the Clayton act and four years after the Supreme Court's construction of the quoted words, left them out. There was much dissatisfaction among the labor unions with the restrictive interpretation given section 20 of the Clayton act by the courts. This resulted in the passage of the Norris-LaGuardia act which remedied the defect of the Clayton act. (See New Negro Alliance v. Sanitary Grocery, supra.) I assume, as the majority opinion does, that the legislature knew the interpretation given by the United States Supreme Court to the quoted words of section 20 of the Clayton act. The only explanation that can logically be given to the omission of those words from the Illinois act is that the legislature did not intend that it be limited to disputes between the employer and his employees. All of this was ignored in the Meadowmoor Dairies case, supra.

As a practical matter there can be no doubt but that a labor dispute exists in the principal case. The refusal of an employer to operate a closed shop tends to lessen the advantages a union offers to its members. If the union is unable to enforce a uniform standard of wages in an industry, the employers who pay higher wages will sooner or later be compelled to lower wages or go out of business. The tendency of a non-union low-wage shop is to depress the wages of an entire industry. Thus the defendants in the principal case are only seeking to maintain the higher standard of wages and working conditions which it is the purpose of the union to give them. Such a purpose should be commended rather than condemned. It is unnecessary to consider the question of free speech which is virtually all the majority opinion covers. Here we have a statute obviously intended by the legislature to prevent the issuance of an injunction in a case such as the one before us. This statute as so construed is doubtless constitutional and

should be enforced. While there is no violence, the taking of one customer by the arm, remonstrating with her and another customer for patronizing the place, and the legend on the placards to the effect that the shop was unfair to union labor, are combined and designated as unlawful acts and a libel. Disregarding this sophistry the entirely peaceable picketing should not have been enjoined in this case. Therefore I dissent.

[fols. 73-74] IN SUPREME COURT OF ILLINOIS

No. 25083

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, et al., Appellees,

vs.

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, et al., Appellants

Appeal from First District

JUDGMENT—June 19, 1939

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the Judgment of the Appellate Court aforesaid, Be Affirmed in All Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said Appellees recover of and from the said Appellants Costs by them in this behalf expended, to be taxed, and that they have execution therefor.

Clerk's Certificate to foregoing paper omitted in printing.

[fols. 75-82] In Supreme Court of Illinois

[Title omitted]

Order Denying Rehearing—October 13, 1939

And now on this day the Court having duly considered the petition for rehearing filed herein and the Court being now advised in the premises doth overrule the prayer of the petition and denies a rehearing of this cause.

[fol. 83] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 84] Supreme Court of the United States

Order for Stay of Mandate Without Bond

Upon consideration of the motion of counsel for Petitioners in the above entitled cause, and good cause therefor having been shown:

It is Now Here Ordered, that the mandate of the Supreme Court of Illinois in the above entitled cause be stayed, without bond, until December 21, 1939, and if on or before December 21, 1939, a petition for writ of certiorari shall be filed with this Court, such mandate is hereby stayed until final action on such petition has been taken by this Court.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 15th day of November, 1939.

[fol. 85] Supreme Court of the United States

Stipulation of Portions of Record Not to be Printed—Filed December 18, 1939

The parties to this cause, through their respective attorneys, hereby stipulated to omit from the printed record all matter not explicitly designated below as not essential to a consideration of the questions presented by the petition for writ of certiorari; and that the printed record shall contain the following matter:

1. Complaint, pages 4-22.

2. Injunctional order by circuit court, of July 17, 1937, pages 22-24.

3. Order by circuit court of January 17, 1938 denying plaintiffs' motion to strike defendant's answers, page 24.

4. Order by circuit court of January 20, 1938 dissolving injunction and giving leave to file amended complaint, pages 24-25.

[fol. 86] 5. Order by circuit court of February 15, 1938 dismissing cause, pages 26-27.

6. Sworn answer of Journeymen Barbers International Union, filed July 27, 1937, pages 28-30.

7. Sworn answer of Hairdressers and Cosmetologists Union, filed August 26, 1937, pages 31-37.

8. Certificate of Clerk of Circuit Court, page 58.

9. Appellate Court judgment, December 21, 1938, page 64.

10. Appellate Court order of January 9, 1939, certifying cause to Supreme Court of Illinois, page 64.

11. Certificate of Appellate Court Clerk of January 17, 1939, page 65.

12. Opinion, concurring opinions and dissent, in Supreme Court of Illinois, pages 68-72.

13. Judgment of Supreme Court of Illinois, June 19, 1939, page 73.

14. Denial of petition for rehearing by Supreme Court of Illinois, October 13, 1939, page 75.

15. Certificate by Clerk of Supreme Court of Illinois November 24, 1939, page 83.

16. Stay of mandate by order of Supreme Court of the United States, page —.

17. This stipulation, page —.

Walter F. Dodd, Daniel D. Carmell, Attorneys for Petitioners; Myer N. Rosengard, Samuel A. Rinella, Attorneys for Respondents.

December 4, 1939.

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[fol. 36] UNITED STATES OF AMERICA,
State of Illinois, ss:

At a term of the Supreme Court, begun and held at Springfield on Tuesday, the Sixth day of February in the year of our Lord One Thousand Nine Hundred and ——, within and for the State of Illinois,

Present: Francis S. Wilson, Chief Justice; Justice Clyde E. Stone, Justice Paul Farthing, Justice Walter T. Gunn, Justice Norman L. Jones, Justice Elwyn R. Shaw, Justice Loren E. Murphy, John E. Cassidy, Attorney General; Warren C. Murray, Marshal. Attest: Adam F. Bloch, Clerk.

Be it remembered, that to-wit, on the 8th day of March, A. D. 1940, the same being one of the days in vacation after the term of Court aforesaid there was filed in the office of the Clerk of the Supreme Court of Illinois by American Federation of Labor, et al., plaintiffs in error, duly certified transcript of proceedings had in the Appellate Court of the First District, and afterwards, to-wit, on the 12th day of March, 1940, Abstracts of Record were filed in the office of the Clerk of the Supreme Court, a copy of such Abstract of Record being in the words and figures as follows, to-wit:

[fol. 37] Abstract of Record

IN THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

No. 40195

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, et al.,
Appellants,

vs.

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, et al., Appellees.

DECREE

This cause again coming on to be heard, and it appearing:

(1) That this Court in this case, on December 21, 1938, reversed, annulled and set aside orders of the Circuit Court of Cook County of January 20, 1938, and February 15, 1938, without remandment, and taxed costs against ap-

pellees, American Federation of Labor, et al.; the Circuit Court order of January 20, 1938, being an order dissolving an injunction against American Federation of Labor, et al., striking the complaint of Swing et al. for want of equity on its face, setting date for assessment of damages and giving appellants time within which to file an amended complaint, and the order of February 15, 1938, being an order assessing damages and dismissing the cause on appellants' election to stand on their original bill:

(2) That the Supreme Court of Illinois in this case, bearing Docket No. 25,083, in that Court, affirmed judgment of [fol. 38] this Court and has transmitted to this Court its judgment to this effect by mandate bearing date of June 19, 1939;

(3) That this Court and the Supreme Court of this State have held in this case, that, under the law of this state, peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (i. e., where there is not a proximate relation of employees and employer), and that appellants are entitled in this case to relief by injunction against the threat of such peaceful picketing or persuasion by appellees; and,

(4) That appellants have therefore maintained their complaint, and the equities of the case are with the appellants;

It is hereby ordered, adjudged and decreed, in accordance with the mandate of the Supreme Court of Illinois:

That the defendants, American Federation of Labor; John Fitzpatrick, individually and in his official capacity; Chicago Federation of Labor; John Fitzpatrick, President, and Anton Johanson, Vice-President, in their respective official capacities and individually; also all members, officers, etc., of the American Federation of Labor and Chicago Federation of Labor, whose names are unknown to plaintiffs; Journeymen Barbers' International Union of America; Frank Rango, Sixth Vice-President, individually and in his official capacity; and all other members of said Union, whose names are unknown to the plaintiffs; Journeymen Barbers' International Union of America, Local 548; its members whose names are unknown to the plaintiffs, and Frank Rango, Secretary and Treasurer, individually and in his official capacity; Hairdressers and Cosmetologists Union, Local 548-D; and its members; Patsy Trotta, Sec-

[fol. 39] retary and Treasurer; and Saide S. Murphy, President; individually and in their official capacity, and all other persons, as agents, representatives, members, attorneys of the defendants and all persons acting in concert with said trade union defendants and individual defendants, are hereby permanently enjoined and restrained from:

(a) Picketing or maintaining any picket or pickets at or near the place of business of plaintiff (Swing) at 5558 West North Ave.

(b) Patrolling or congregating in front or in the vicinity of plaintiff's business, in furtherance of pocketing;

(c) Exhibiting or causing to be exhibited any sign or placard or other matter in front of or in the vicinity of plaintiff's business, designating the plaintiff's business as being nonunion or unfair to organized labor, or as refusing to permit collective bargaining, or designed to induce or influence persons not to enter plaintiff's place of business;

(d) Soliciting, inducing or influencing or attempting to induce or influence persons, employees or prospective employees of plaintiff not to enter his place of business or do business with him;

(e) Menacing, intimidating, threatening or harassing persons employed by or persons going to and from plaintiff's place of business; from calling plaintiff and members of plaintiff's family and plaintiff's employees vile names and shouting offensive epithets;

(f) Threatening, coercing, intimidating or assaulting the employees of the plaintiff or harassing the employees of the plaintiff, while on their way to and from their homes to the place of business;

(g) Threatening, coercing, intimidating or assaulting prospective employees, or persons seeking employment from the plaintiff, and from preventing by threats, coercion or intimidation, such prospective employees and persons seeking employment, from entering plaintiff's place of business;

(h) Advising, encouraging or assisting or participating in the doing of any of the things herein forbidden.

[fol. 40] It is Further Ordered that the appellants (plaintiffs in the Circuit Court of Cook County) and each of them

and their surety or sureties upon all bonds heretofore filed in the Circuit Court of Cook County, including injunctional and appeal bonds, are hereby released and discharged from all obligations, rights, claims or liabilities, both as principals and sureties, upon all of said bonds; said aforementioned bonds are hereby declared void and all parties, both principals and sureties, appearing as obligors in said bonds are discharged and released from any and all liabilities, claims or damages.

And It is Further Ordered that all costs in this proceeding are hereby taxed against the appellees herein.

Enter:

David F. Matchett, Presiding Justice, Appellate Court of Illinois, First Division.

February 16, 1940.

Certificate of Sheldon W. Govier, Appellate Court Clerk of First District of Illinois, dated February 16, 1940, that foregoing transcript is a true copy of the final decree of Appellate Court.

ASSIGNMENT OF ERRORS

Now come American Federation of Labor et al. by Walter F. Dodd and Daniel D. Carmell, their attorneys, and say that in the decree of the Appellate Court, aforesaid, there is manifest error in that:

(1) Such decree interferes with their freedom of speech and of assembly and deprives plaintiffs in error of life, liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States;

[fol. 41] (2) Such decree interferes with their freedom of speech and of assembly and denies to plaintiffs in error the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, Plaintiffs in Error pray that said decree of the Appellate Court be set aside, and that this Court dismiss the complaint in this case.

Respectfully submitted, Walter F. Dodd, Daniel D. Carmell, Bailey Stanton, Attorneys for Plaintiffs in Error.

[fol. 42] Be it Remembered, that to-wit, on the 30th day of March, 1940, there was duly filed in the office of the Clerk of the Supreme Court of Illinois Notice and Motion by Plaintiffs in Error, a copy of such Notice and Motion being in the words and figures as follows, to-wit:

[fol. 43] IN THE SUPREME COURT OF ILLINOIS; APRIL TERM, 1940

No. 25624

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL., Plaintiffs of Error,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL., Defendants in Error,

Writ of Error to Appellate Court of Illinois

Honorable David F. Matchett, Judge Presiding

NOTICE

To Mr. Myer N. Rosengard, #1127, 33 North LaSalle St., Mr. Samuel A. Rinella, #1048, One North LaSalle St., Chicago, Illinois, Attorneys for Defendants in Error.

Please Take Notice that on Monday, April 1, A. D. 1940, we shall file in the office of the Clerk of the Supreme Court of Illinois, for presentation to the Supreme Court of Illinois on Tuesday, April 2, A. D. 1940, a motion respecting the record and abstract in the above entitled cause, together with proof of service of this notice. A copy of said motion is herewith served upon you.

Walter F. Dodd, Daniel D. Carmell, Bailey Stanton,
Attorneys for Plaintiffs in Error.

Received copies of the foregoing Notice, together with copies of the motion therein referred to this 28th day of March, A. D. 1940

Myer N. Rosengard, Samuel A. Rinelle.

[fol. 44] IN THE SUPREME COURT OF ILLINOIS, APRIL TERM, A. D. 1940

No. 25624

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, et al., Plaintiffs in Error,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, et al., Defendants in Error

Writ of Error to the Appellate Court of Illinois, First District

Honorable David F. Matchett, Judge Presiding

MOTION BY PLAINTIFFS IN ERROR

Now comes American Federation of Labor, et al., plaintiffs in error, by their attorneys, Walter F. Dodd, Daniel D. Carmell, and Bailey Stanton, and move that the record and abstract in Swing et al. vs. American Federation of Labor, et al., No. 25083, be taken as parts of the record and abstract in the present case, if writ of error is entertained in the present case. In the writ of error here presented, the parties are the same as in No. 25,083, and the issue here presented is identical with that in No. 25083, except that there a temporary injunction was involved, whereas there is here involved an order of the Appellate Court making such injunction permanent. This is therefore a continuation of the same case, and is instituted for the purpose of obtaining a final judgment of this Court with respect to such permanent injunction, which was entered by the Appellate Court in accordance with the mandate issued to that Court by this Court in No. 25083.

Walter F. Dodd, Daniel D. Carmell, Bailey Stanton,
Attorneys for Plaintiffs in Error.

[fol. 45] Be It Remembered, that to-wit, on the 1st day of April, 1940, Notice, Motion, and Suggestions were filed in the office of the Clerk of the Supreme Court by Defend-

ants in Error, a copy of such Notice, Motion, and Suggestions being in the words and figures as follows, to-wit:

[fol. 46] IN THE SUPREME COURT OF ILLINOIS, APRIL TERM, A. D. 1940

No. 25624

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, et al., Plaintiffs in Error,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, et al., Defendants in Error

Writ of Error to Appellate Court of Illinois

Honorable David F. Matchett, Judge Presiding

NOTICE

To Walter F. Dodd, Daniel D. Carmell and Bailey Stanton, Attorneys for Plaintiffs in Error:

You Will Please Take Notice That on Monday, April 1, A. D. 1940, we shall file in the office of the Clerk of the Supreme Court of Illinois, for presentation to the Supreme Court of Illinois, on Tuesday, April 2, A. D. 1940, a motion to dismiss the writ of error in the above cause, together with proof of service of this notice, and suggestions in support of said motion. Copies of said motion and suggestions are herewith served upon you.

Samuel A. Rinella, Myer W. Rosengard, Attorneys for Defendants in Error.

Received a copy of the foregoing Notice, together with copy of motion and suggestions this 28th day of March, 1940.

Walter F. Dodd, Daniel D. Carmell, Bailey Stanton, Attorneys for Plaintiffs in Error.

[fol. 47] IN THE SUPREME COURT OF ILLINOIS, APRIL TERM, A. D. 1940

No. 25624

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, et al., Plaintiffs in Error,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, et al., Defendants in Error

Writ of Error to Appellate Court of Illinois

Honorable David F. Matchett, Judge Presiding

MOTION TO DISMISS WRIT OF ERROR

Now come Ross W. Swing, Irene Boivin, Nan Chapman, et al., Defendants in Error, by Samuel A. Rinella and Myer N. Rosengard, their attorneys, and move the Court to dismiss the writ of error sued out in this cause, as per suggestions filed in support of this motion.

Samuel A. Rinella, Myer N. Rosengard, Attorneys for Defendants in Error.

[fol. 48] IN THE SUPREME COURT OF ILLINOIS, APRIL TERM, A. D. 1940

No. 25624

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR et al., Plaintiffs in Error,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN et al., Defendants in Error

Writ of Error to Appellate Court of Illinois

Honorable David F. Matchett, Judge Presiding

SUGGESTION IN SUPPORT OF MOTION TO DISMISS WRIT OF ERROR

May it please the Court:

The foregoing writ of error has been sued out of this Court seeking review of a final decree entered in the Appellate Court of Illinois, for the First District and in the First Division thereof.

The subject matter of the proceeding was heretofore before this Court in the case of Ross W. Swing, Irene Boivin, et al., as Appellants, v. American Federation of Labor, et al., as appellees, case No. 25083; and in which case this Court rendered and filed an opinion reported in 372 Ill. 91.

It is conceded by Plaintiffs in Error in their brief filed herein as follows: (Page 1)

"The writ of error is here presented with knowledge that this court has fully settled all issues of the case in a prior review thereof and that the decree entered by the Appellate Court is in compliance with the mandate of this court * * * If this court adheres to the position in People v. Militzer, 301 Ill. 284, page 287, that issues once decided on review will not be again considered on a second review, a final order in this case may properly dismiss the writ of error on the ground that all issues of the case have been settled on prior appeal and that the decree entered by the Appellate Court is in conformity with the mandate issued to the Appellate Court by this Court."

[fol. 49] This cause was brought to this Court by Certificate of Importance issued by the Appellate Court, and the review here involved the question as to whether or no a temporary injunctional order was properly issued and whether or no the bill of complaint stated a cause of action. The trial court entered an order striking the bill of complaint for want of equity on its face and dismissed the bill of complaint; thus dissolving the preliminary injunctional order. The Appellate Court for the First District reversed the cause without remandment, and this Court affirmed the order of the Appellate Court. Consistent with what appeared to be the mandate of this Court, as expressed in the opinion, the Appellate Court entered a final decree. This decree makes permanent the preliminary injunctional order; there are no other or further provisions in the decree (Abs. 3).

We are further advised that the Plaintiffs in Error will move in this Court that the records and proceedings, together with the abstract of record and briefs filed by both parties in Case No. 25083 should stand as the abstracts and briefs in support of and in opposition to this writ of error proceedings now before this Court.

We respectfully suggest that the Plaintiffs in Error seek by this proceeding to have this Court review its former deci-

sion and opinion in the same case. This is conceded by them to be their position in their brief as above quoted from.

We also respectfully submit that under the decisions of this Court in many cases, particularly the cases of People v. Militzer, 301 Ill. 284, and Tribune Co. v. Emery Motor Delivery Co., 338 Ill. 537, the order and opinion of this Court in this case and on previous appeal, finally settles all of the rights of the parties, and that the Plaintiffs in Error are not entitled to a further review.

It is therefore most respectfully suggested that the motion to dismiss the writ of error should be sustained.

Respectfully submitted; Samuel A. Rinella, Myer N. Rosengard, Attorneys for Defendants in Error.

[fol. 50] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a term of the Supreme Court, begun and held in Springfield, on Tuesday, the Third day of April in the year of our Lord, One Thousand Nine Hundred and Forty, within and for the State of Illinois.

Present: Francis S. Wilson, Chief Justice; Justice Clyde E. Stone, Justice Paul Farthing, Justice Walter T. Gunn, Justice Norman L. Jones, Justice Elwyn R. Shaw, Justice Loren E. Murphy, John E. Cassidy, Attorney General, Warren C. Murray, Marshal. Attest: Adam F. Bloch, Clerk.

Be it remembered, that to-wit, on the 4th day of April, A. D. 1940, the same being one of the days of the said April term of said Supreme Court, the following proceedings were by said Court had and entered of record in the words and figures as follows, to-wit:

No. 25624

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, et al., Plaintiffs in Error,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, et al., Defendants in Error

ERROR TO APPELLATE COURT OF FIRST DISTRICT

Now on this day the Court having duly considered the motion by defendants in error to dismiss writ of error,

and the Court being now advised in the premises grants the motion and it is ordered that writ of error herein be and it is dismissed.

In view of the ruling on the motion of defendants in error it is not necessary to consider the motion of plaintiffs in error that record and abstract in No. 25083 be taken as parts of the record and abstract in this case.

[fol. 51] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a term of the Supreme Court, begun and held in Springfield, on Tuesday, the Third day of April in the year of our Lord One Thousand Nine Hundred and Forty within and for the State of Illinois.

Present: Francis S. Wilson, Chief Justice, Justice Clyde E. Stone, Justice Paul Farthing, Justice Walter T. Gunn, Justice Norman L. Jones, Justice Elwyn R. Shaw, Justice Loren E. Murphy, John E. Cassidy, Attorney General, Warren C. Murray, Marshal, Adam F. Bloch, Clerk.

Be it remembered, that, to-wit: on the 4th day of April, 1940, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

No. 25624

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, et al., Plaintiffs in Error,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, et al., Defendants in Error

ERROR TO APPELLATE COURT, FIRST DISTRICT

40195

And now on this day the Court having diligently examined and inspected as well the record and proceedings aforesaid, as the motion of the Defendants in Error to dismiss this Writ of Error and being fully advised of and con-

cerning the premises, are of the opinion that the said Writ of Error is not well taken.

Therefore, it is considered and ordered by the Court that said Writ of Error be and the same is hence dismissed.

And it is further considered by the Court, that the said Defendants in Error recover of and from the said Plaintiffs in Error costs by them in this behalf expended, and that they have execution therefor.

In Testimony Whereof, I have set my hand and affixed the Seal of the said Supreme Court, in Springfield, in said State, this 5th day of April A. D. 1940.

Adam F. Bloch, Clerk Supreme Court. (Seal.)

[fol. 52] State of Illinois,
Supreme Court, ss:

I, Adam F. Bloch, Clerk of the Supreme Court of the State of Illinois, and keeper of the records and seal thereof, do hereby certify the above and foregoing to be a true copy of Transcript of Record for filing on Petition for Certiorari in the United States Supreme Court in a certain cause entitled in this Court American Federation of Labor, John Fitzpatrick, Chicago Federation of Labor, et al., Plaintiffs in Error, vs. Ross W. Swing, Irene B avin, Nan Chapman, et al., No. 25624, Error Appellate Court of First District, filed in this office on the 8th day of March, A. D. 1940.

Witnes my hand and Seal of said Supreme Court, at Springfield, in said State, this 5th day of April, A. D. 1940.

Adam F. Bloch, Clerk. (Seal.)

[fol. 53] Supreme Court of the United States

Order Allowing Certiorari—Filed May 20, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILE COPY

Office - Supreme Court, U. S.
FILED
APR 19 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. [redacted] 56

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT OF PETITION.

WALTER F. DODD,
DANIEL D. CARMELL,
Attorneys for Petitioners.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No.....

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioners, American Federation of Labor, John Fitzpatrick, Chicago Federation of Labor, and others, respectfully petition this Honorable Court for a writ of certiorari to the Supreme Court of Illinois. Writ of certiorari was denied in this case (No. 615) for the want of a final judgment, but such an objection does not apply to the present petition.

Summary Statement of the Matter Involved.

This case involves the validity of paragraphs (a), (b), (c) and (d) of injunctions the provisions of which are set forth at pages 5-6 of this petition. The validity of

such paragraphs is contested on the ground that they restrain freedom of speech and of assembly in violation of the Fourteenth Amendment to the Constitution of the United States. No issue was made in the Appellate or Supreme Court of Illinois or is now made as to the validity of the provisions of the injunctions so far as they enjoin acts of violence.

A temporary injunction, in the terms set out on page 5 was granted by the Circuit Court of Cook County, Illinois, on July 17, 1937, upon the basis of complaint by Swing and his employees. (R. 13-14.) The complaint alleged an effort upon the part of defendant unions and their members to unionize Swing's beauty parlor, whose employees were not members of the union; that violence had been used in picketing and solicitation; and that pickets carried signs that "This Beauty Shop is Unfair to Organized Labor"; and that such signs were false and malicious.

Subsequent to the issuance of the temporary injunction, the defendants barbers and hair dressers unions filed answers, on July 27, 1937, and August 26, 1937. (R. 16, 18.) The answers of defendant Hairdressers and Cosmetoligists union denied acts of violence; alleged that the signs displayed by pickets were true and that there was never more than one picket in front of or in the vicinity of Swing's shop; admitted that his employees were not members of the union but alleged that they were threatened with discharge if they joined the union; and alleged a right to picket or unionize Swing's shop and to obtain for its employees wages and hours commensurate with that of other employees. (R. 18-23.)

Thereafter, on January 20, 1938, the Circuit Court of Cook County, Illinois, on motion of defendants to dissolve the injunction and dismiss the cause for want of

equity on the face of the complaint, dissolved the injunction, struck the complaint for want of equity on its face, set a day for the assessing of damages, and gave plaintiffs leave to file an amended complaint. (R. 15.) Plaintiffs elected to stand on their complaint, and on February 15, 1938, the Circuit Court of Cook County struck the complaint for want of equity on its face, dismissed the cause, and assessed damages against the plaintiffs. (R. 15, 16.)

Under Illinois practice: "A motion to dismiss, like a demurrer, admits such facts as are directly alleged. A demurrer or motion to dismiss does not admit conclusions drawn by the pleader." *Barzowski* v. *Highland Park State Bank*, 371 Ill. 412 (1939), p. 416.

The plaintiffs appealed to the Appellate Court for the First District of Illinois. That Court on December 21, 1938, without remandment of the case, reversed, annulled and set aside the orders of the Circuit Court bearing date of January 20, and February 15, 1938, and taxed costs against appellees, who were defendants below. (R. 23-24.) The Appellate Court granted leave to appeal to the Supreme Court of Illinois by a certificate of importance. (R. 24.) The Supreme Court of Illinois entered judgment on June 19, 1939, affirming the judgment of the Appellate Court and taxing costs against appellants in that Court, who were the defendants in the trial court. (R. 33.) The Supreme Court of Illinois denied rehearing on October 13, 1939. (R. 34.)

The opinion of the Supreme Court of Illinois appears in 372 Ill. 91, and is set forth in full in the record, together with the dissent therein. (R. 24.) The opinion is primarily based on the view that allegations of violence are admitted by the motion to dismiss, and that all provisions of the temporary injunction must be treated as a whole. The first sentence of the dissent clearly shows that appel-

lants in that case at no time contested the validity of provisions of the injunction directed against acts of violence.

Upon remandment of the case by the Supreme Court of Illinois, a decree was entered by the Appellate Court of Illinois, First District, on February 16, 1940, making permanent the terms of the injunction originally issued by the trial court and applying such injunction not only to the unions and their members but "to all other persons, as agents, representatives, members, attorneys of the defendants and all persons acting in concert with said trade union defendants and individual defendants." The decree of the Appellate Court is set out in full in the record. (R. 36-39.)

Two provisions of the decree of the Appellate Court emphasize the issues here made by petitioners:

(1) Paragraph 3 of the decree specifically finds that the right to injunctive relief is based upon the absence of an employer-employee relationship between the parties.

(2) The injunction is expressly made applicable, not only to the defendants, but to "all persons acting in concert with said trade union defendants."

With respect to the paragraphs of the injunction forbidding peaceful action which are here contested by petitioners, the finding by the Appellate Court that the right to injunctional relief arises out of the absence of an employer-employee relationship removes from the case all elements of force or of alleged untrue signs which, if well pleaded, and not merely conclusions of the pleader, were admitted as a matter of pleading in the motion to dismiss the complaint. And the dismissal of writ of error by the Supreme Court of Illinois constitutes an affirmance of such finding.

A writ of error was sued out in the Supreme Court of Illinois to review the validity of the decree entered by the Appellate Court making permanent the terms of the injunction here involved. Defendants in error moved to dismiss the writ of error on the ground that all the rights of the parties had been finally settled on previous appeal, and that plaintiffs in error were not entitled to a further review. (R. 43-45.) This motion was granted by the Supreme Court of Illinois and writ of error dismissed on April 4, 1940. (R. 46-47.)

The acts enjoined by the temporary and permanent injunctions are as follows:

(a) Picketing or maintaining any picket or pickets at or near the place of business of plaintiff (Swing) at 5558 West North Ave.

(b) Patrolling or congregating in front or in the vicinity of plaintiff's business, in furtherance of picketing;

(c) Exhibiting or causing to be exhibited any sign or placard or other matter in front of or in the vicinity of plaintiff's business, designating the plaintiff's business as being nonunion or unfair to organized labor, or as refusing to permit collective bargaining, or designed to induce or influence persons not to enter plaintiff's place of business;

(d) Soliciting, inducing, or influencing or attempting to induce or influence persons, employees or prospective employees of plaintiff not to enter his place of business or do business with him;

(e) Menacing, intimidating, threatening or harassing persons employed by or persons going to and from plaintiff's place of business; from calling plaintiff and members of plaintiff's family and plaintiff's employees vile names and shouting offensive epithets;

(f) Threatening, coercing, intimidating or assaulting the employees of the plaintiff or harassing the employees of the plaintiff, while on their way to and from their homes to the place of business;

(g) Threatening, coercing, intimidating or assault-

ing prospective employees, or persons seeking employment from the plaintiff, and from preventing by threats, coercion or intimidation, such prospective employees and persons seeking employment, from entering plaintiff's place of business;

(h) Advising, encouraging or assisting or participating in the doing of any of the things herein forbidden.

The matter involved in the case is that as to whether a state court may restrict the freedom of speech and of assembly guaranteed by the Fourteenth Amendment by declaring the objective of peaceful unionizing of a non-union shop to be unlawful under the law of that state and by enjoining as unlawful all peaceful means of accomplishing that objective.

This Court Has Jurisdiction.

1. The federal constitutional issues are properly preserved. This case presents constitutional issues as to both the temporary and the permanent injunctions. If an injunction of this character violates the constitution of the United States, petitioners and those in like circumstances would receive little comfort from a protection against permanent injunctions alone. The constitutional issue as to the temporary injunction is properly preserved, because, certiorari having been denied by this Court with respect to the temporary injunction, petitioners now invoke the jurisdiction of this Court with respect to the temporary injunction at the first opportunity open to them. In this respect the situation is the same as in *Gant* v. *Oklahoma City*, 289 U. S. 98, 100.

The issue as to the validity of the temporary injunction in this case under the terms of the Fourteenth Amendment was presented to and determined by the Supreme Court of Illinois when this case was first before that court. The opinion and dissent are incorporated in the record. (R.

24-33.) Although the petitioners do not agree with the statement of their contention by the Supreme Court of Illinois, such statement clearly shows that the federal issue was presented and decided. The Supreme Court of Illinois said:

> "It is contended by them (the petitioners in this Court) that Section 4 of Article 2 of the Constitution of Illinois and the fourteenth amendment to the Constitution of the United States protect them in their exhibition of the placards and signs derogatory to the plaintiff's business and intended to destroy it."

The issue presented by the terms of the injunction and argued in the state court did not involve an intent to destroy plaintiff's business, although this is the basic idea in the opinion of the Supreme Court of Illinois. The issue includes all matters covered by paragraphs (a), (b), (c) and (d) as supplemented by paragraph (h) of the injunction, but in no respect contested the power of the court to enjoin acts of violence.

The issue argued in the state court that the injunction was directly violative of the Illinois Anti-Injunction Act of 1925 is not presented here, but in holding the state issue to be sufficient, Mr. Justice Farthing, in dissent, properly said that "the question of free speech * * * is virtually all the majority opinion covers." (R. 32.)

With respect to the permanent injunction, an assignment of error presented to the Supreme Court of Illinois on writ of error preserves federal constitutional issues as to due process of law and denial of privileges and immunities of citizens of the United States, both under the Fourteenth Amendment. (R. 39.) Action by the Supreme Court of Illinois upon these assignments was necessarily involved in the granting of the motion of defendants in error for dismissal of writ of error on the ground that all rights of the parties had been settled on previous appeal. (R. 45-47.) Neither a state nor municipal enactment is here

involved, but the privileges and immunities clause of the Fourteenth Amendment is not limited to legislation enacted by a state. It applies to any law which the state "shall make or enforce."

2. There is a final judgment by the highest court in the state in which decision could be had. Dismissal of writ of error constitutes a final judgment by the Supreme Court of Illinois, and all remedies in the state courts have been exhausted.

This Court may have some question as to whether there is any further right of review by the Supreme Court of Illinois. One ground for dismissal of writ of error in *Matthews* v. *Huwe*, 269 U. S. 262, p. 265, was that plaintiffs in error did not seek review by certiorari after their petitions for writ of error had been denied by the State Supreme Court.

In Illinois, writ of error is the only method of review by the State Supreme Court of a decision of an Appellate Court where a constitutional issue has been first raised in the Appellate Court. *Hallberg* v. *Goldblatt Bros.*, 363 Ill. 25, p. 29. However, if appeal as well as writ of error should lie, each is a review as of right, and if, by mistake, the one is sought rather than the other, Rule 28 of the Illinois Supreme Court provides that "the case shall be considered as if the proper method of review had been employed."

Section 75 of the Illinois Civil Practice Act (Ill. Rev. Stats. 1939, Ch. 110, Sec. 199) provides for direct appeal to the State Supreme Court from trial courts in cases involving constitutional issues, and where appeal is taken to the Appellate Court in a case involving constitutional issues, such issues are waived. This provision was discussed by this Court in *Central Union Telephone Co.* v. *Edwardsville*, 269 U. S. 190. Discretionary review of the Appellate Court by the Supreme Court does not apply

to constitutional issues; but review is a matter of right when the constitutional issue presents itself in the Appellate Court. Here the dismissal of writ of error by the Supreme Court relates to a constitutional issue arising out of a decree of the Appellate Court and thus first presenting itself in that court. All remedies of review by the state Supreme Court have been exhausted.

3. The writ is directed to the proper court. It may be argued that dismissal of writ of error by the Supreme Court of Illinois was not the final judgment and that the writ of certiorari should lie to the Appellate Court. But there is no question of the jurisdiction of the Supreme Court of Illinois to entertain the writ of error, and in this respect the present case is clearly in line with the holding of this Court in *Van Huffel* v. *Harkelrode,* 284 U. S. 225, page 230. There was no refusal to take the case for want of jurisdiction, as in *Randall* v. *Board of Commissioners,* 261 U. S. 252. The rule stated in *Matthews* v. *Huwe,* 269 U. S. 262, clearly applies here. And here, as in the *Van Huffel* case, the record remained in the possession of the State Supreme Court, and the writ should be directed to the court having the record in its possession.

4. The writ is directed to the proper judgment. This Court having already, on a prior petition, taken the view that there was a want of final judgment in this case as previously presented, the questions sought to be presented cannot now be said to arise on the first judgment and not on the second, as in *Rio Grande Western Ry. Co.* v. *Stringham,* 239 U. S. 44, 47. The issues presented by both judgments are substantially the same, but as heretofore indicated, the issues as to both the temporary and permanent injunctions are now presented to this Court.

5. The relief sought is proper for the parties in this case. Certain of the petitioners are associations and as such are subject to the rule that liberty of speech and of

assembly "is the liberty of natural, not artificial, persons." Mr. Justice Stone in *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, p. 527. In the present case not only the unions but also all members of the several unions are made defendants, and the injunctions apply in terms to all defendants. (R. 1, 13-14.)

The Question Presented.

The only question presented to this Court is that as to whether the injunctions involved herein deprive of rights of speech and assembly in appropriate public places, and establish a previous judicial censorship of speech and of the press, violative of constitutional rights under the Fourteenth Amendment, as guaranteed by the due process clause and the clause forbidding any law which shall abridge the privileges or immunities of citizens of the United States.

This question presents the issue as to the correctness of the State court's position that the whole scheme of action by organized labor in the present case is unlawful and that therefore all otherwise lawful acts which may seek to bring pressure upon the employer are unlawful and may properly be enjoined.

Reasons Relied on for Allowance of Writ.

A substantial federal question presents itself with respect to the scope of state judicial censorship upon the rights of speech and assembly. This question has not been heretofore determined by this Court.

So far as petitioners are informed, this case presents for the first time the question as to whether state courts in their determination of the law in the several states may establish standards defining and limiting the opera-

tion of federal guarantees of freedom of speech and of assembly.

This case involves the question as to whether an injunction may be issued by a state court prohibiting officers and members of local organized groups of barbers and hairdressers and all other members of the American Federation of Labor and of the Chicago Federation of Labor (petitioners here) together with "all persons acting in concert with said trade union defendants and individual defendants," from (1) giving publicity to their view that the beauty shop of respondent Swing is unfair to organized labor, through the exhibition of signs or placards "designed to induce and influence persons not to enter plaintiff Swing's (respondent's) place of business" or (2) from soliciting persons not to enter his place of business or to do business with him; or (3) from picketing or maintaining any picket or pickets at or near the place of business of respondent; or (4) from patrolling or congregating in front of or in the vicinity of respondent's place of business, in furtherance of picketing; even though the acts of giving publicity or soliciting or of picketing or patrolling may be peaceful and even though the future statements upon signs or placards may be in no sense untrue. It presents the issue as to whether an injunction of a state court may accomplish the purpose which this Court has held may not be accomplished by state statute or by municipal ordinance. *Schneider* v. *State*, 60 S. Ct. 146, 84 Law Ed. 115, decided by this Court on November 22, 1939.

This Court has held in *Near* v. *State of Minnesota*, 283 U. S. 697 (1931) that a state law may not authorize the courts to enforce a previous censorship on freedom of speech and of the press. The *Near* case involved a single newspaper. The present case involves a single employer,

but the same principles apply in the *Near* case to all newspapers, and in the present case to all labor unions and all employers.

Although the American Federation of Labor and the Chicago Federation of Labor and the members thereof are parties in this case, they are so because of the membership therein of local unions, and the pleadings show that the injunction is primarily directed against members of the local unions of barbers and hairdressers because of their actions or anticipated actions with respect to a nonunion beauty shop and nonunion workers in the same industry and within the same territorial area. The decree of the Appellate Court of Illinois applies also to "all persons acting in concert with said trade union defendants and individual defendants." (R. 1-13, 16-18, 18-23, 36-39.)

The acts enjoined by the state court are set forth in eight paragraphs of the injunction, which are printed above. The text of the injunction as issued by the trial court appears in the record at page 14, and the clauses (a) to (h) enjoining certain practices are identical in the injunction in the trial court and in the decree of the Appellate Court. (R. 36-39.) Although there are intimations to the contrary in the opinion of the Supreme Court of Illinois, the case presented to that court in no way involved the validity of paragraphs (e), (f) and (g) of the injunction. The validity of these paragraphs was fully recognized by the appellants in that court, who are the petitioners here; and a statement to this effect appears in the dissenting opinion. (R. 29.)

Paragraphs (a) and (b) of the injunctions present substantially the same issues as those in *Thornhill* v. *State of Alabama* (No. 514) and *Carlson* v. *State of California* (No. 667), except that here an injunction seeks to accomplish the same result as statutes and ordinances in

those cases. Paragraphs (c) and (d) of the injunction (R. 14, 36-39) impose restrictions upon speech and assembly much broader than those in the *Thornhill* and *Carlson* cases.

It will be noted that (except as to paragraph (h)), each paragraph is independent of the other and that paragraphs (c) and (d) forbid not only peaceful action, but any assembly upon streets or other public places for the purpose of making representations to persons either orally or in writing. Paragraph (h) forbids not only participation in such acts but also "advising, encouraging or assisting" therein.

Attention should also be called to the fact that paragraph (a) is limited to acts "at or near the place of business of plaintiff"; and that paragraphs (b) and (c) are limited to acts "in front of or in the vicinity of the plaintiff's business;" but that paragraph (d) has no limits of time or place but restrains soliciting, influencing or attempting to influence, whether in public or private place or in public or private statement or conversation.

The breadth of paragraph (d) of the injunctions is such as to prohibit a local barbers' union as a member of the Chicago Federation of Labor from stating its views regarding the respondent at any meeting of that organization.

And, in addition, all members of the Chicago Federation of Labor and of the American Federation of Labor are subject to the terms of this injunction; and every act of solicitation or encouragement of solicitation on the part of any such member is subject to punishment as contempt of court. Neither the Chicago Federation of Labor nor the American Federation of Labor nor local unions may attempt in any manner to unionize present or

future employees of respondent Swing, or to discourage their members or others from patronizing him. Moreover, attention should again be called to the fact that the decree of the Appellate Court makes the injunction applicable to "all persons acting in concert with said trade union defendants and individual defendants."

An analysis of the injunctions in this case clearly shows material restrictions upon freedom of speech and of assembly. Such restrictions may not be imposed by state statute or by municipal ordinance. A decision in this case should determine whether such power may be exercised by state courts.

Respectfully submitted,

WALTER F. DODD,
DANIEL D. CARMELL,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions Below.

The opinion of the Illinois Appellate Court for the First District is reported in 298 Ill. App. 63. The opinion of the Supreme Court of Illinois is reported in 372 Ill. 91 (advance sheet). The opinion and dissent in the Supreme Court of Illinois are printed in full in the record. (R. 24-33.)

Jurisdiction.

With respect to the judicial restraint of rights of assembly and speech under the Fourteenth Amendment, the opinion of the Supreme Court of Illinois raises and determines a substantial federal question not heretofore de-

termined by this Court; and the jurisdiction of this Court is invoked under section 237(b) of the Judicial Code.

A petition for rehearing in this case was denied by the Supreme Court of Illinois on October 13, 1939. (R. 34.)

On remandment to the Appellate Court of Illinois, a decree was entered by that Court on February 16, 1940, making permanent the terms of the injunction previously sustained by the Supreme Court of Illinois. (R. 36-39.) Writ of error to review the action of the Appellate Court was denied by the Supreme Court of Illinois on April 4, 1940. (R. 45-47.) The grounds of jurisdiction are set forth more specifically in the petition for certiorari.

Statement of the Case.

The case involves no issues of fact, but only the question as to the validity of clauses (a), (b), (c) and (d) of injunctions whose terms are set out in full in the record (R. 13-14, 36-39) and in the petition for certiorari.

These clauses forbid

(1) Picketing or maintaining any picket or pickets at or near the place of business of plaintiff;

(2) Patrolling or congregating in front of or in the vicinity of plaintiff's business in furtherance of picketing;

(3) All future exhibition of any sign, placard or other matter in front of or in the vicinity of plaintiff's (respondent's) business "designating plaintiff's business as being non-union or unfair to organized labor, or as refusing to permit collective bargaining, or designed to induce or influence persons not to enter plaintiff's place of business;"

(4) "Soliciting, inducing or influencing or attempting to induce or influence persons, employees or prospective employees of plaintiff not to enter his place of business or do business with him."

Paragraph (h) of the injunctions supplements paragraphs (a), (b), (c) and (d) and restrains "advising, encouraging or assisting or participating in the doing of any of the things herein forbidden." The permanent injunction is, in addition, specifically applicable to "all persons acting in concert with said trade union defendants and individual defendants." (R. 38.)

Paragraph (a) is limited to acts "at or near the place of business of plaintiff," and paragraphs (b) and (c) are limited to acts "in front of or in the vicinity of plaintiff's business." Paragraph (d) is not limited to specific persons, time or place but applies to private or family conversations as well as to all influence exerted in public or in house to house solicitation. And in view of the fact that other and admittedly valid clauses of the injunctions restrain acts of force and violence, these clauses must be construed to restrain peaceful acts.

Errors Relied Upon.

(1) Petitioners assign as error the holding by the Supreme Court of Illinois that the courts of that state may enjoin all types of picketing or patrolling or congregating in furtherance of picketing, and all types of solicitation, and also peaceful assembly upon streets or other public places for the purpose of making representations to persons either orally or in writing, and for the purpose of displaying signs or placards indicating unfairness to organized labor, the injunctions in these respects restraining all future actions irrespective of whether their conduct may be peaceful and irrespective of whether the future representations, signs or placards may be true or false. Petitioners aver that such an injunction is, with respect to these provisions, void on its face because it provides a pre-

vious judicial censorship of speech and assembly, in violation of the Fourteenth Amendment.

(2) The Supreme Court of Illinois also erred in holding that a Court may determine in advance and enjoin future statements which it regards as untrue, or because it regarded prior statements as untrue. In view of the fact that the injunctions on their face forbid future statements, irrespective of their truth or falsity, it may be unnecessary, however, to consider whether the guarantee of freedom of speech by the Fourteenth Amendment includes a freedom to make untrue or false statements without previous censorship, subject to civil and criminal liability for the abuse of the privilege.

(3) The Supreme Court of Illinois erred in holding that the whole scheme of action by organized labor in the present case is unlawful, and that therefore all acts which may seek to bring pressure upon the employer are unlawful and may properly be enjoined as parts of an unlawful scheme. Such a holding is violative of the Fourteenth Amendment.

ARGUMENT.

I.

Previous Censorship of the Exercise of the Right of Assembly and of Speech Is Violative of the Fourteenth Amendment.

It is fully established that previous censorship of the exercise of the right of speech and assembly by means of state statutes or municipal ordinances is violative of the Fourteenth Amendment. *Schneider* v. *State,* 60 S. Ct. 146, 84 L. Ed. 115, decided by this Court November 22, 1939; *Near* v. *State of Minnesota,* 283 U. S. 697. Leaving aside for the moment the question whether state judicial restraint stands upon a different basis, it may here be pointed out that the restraint sought to be imposed in the present case falls within the limits established by this Court with respect to state statutes and municipal ordinances.

One of the cases decided with *Schneider* v. *State* is closely parallel with the present case. *Snyder* v. *City of Milwaukee* involved a Milwaukee ordinance forbidding the circulation or distribution of circulars, handbills or other printed matter in streets and other public places. Here we have a similar prohibition by injunction, with the law so applied as to authorize trial courts in Illinois to issue similar injunctions in all other cases. In the Milwaukee case: "The petitioner, who was acting as a picket, stood in the street in front of a meat market and distributed to passing pedestrians hand bills which pertained to a labor dispute with the meat market, set forth the position of organized labor with respect to the market, and asked citizens to refrain from patronizing it." Snyder's conviction of viola-

tion of the ordinance was reversed by this Court, on the ground that "the ordinance cannot be enforced without unconstitutionally abridging the liberty of free speech." In the present case any person performing the same acts as Snyder in the Milwaukee case will be subject to equal or more serious punishment for contempt of court. If the present injunctions are sustained, the courts of Illinois are authorized to accomplish a result which is violative of the Fourteenth Amendment when undertaken by a municipality in Wisconsin.

In *Hague* v. *C. I. O.*, 307 U. S. 496 (1939) "an ordinance was held void on its face because it provided for previous administrative censorship of the exercise of the right of speech and assembly in appropriate public places." An injunction accomplishing the same purpose through state judicial action should suffer the same fate.

Under the decisions of this Court, previous restraint upon freedom of speech such as that here imposed is clearly improper with respect to newspaper publication, distribution of circulars, and house to house solicitation. The injunction clauses here attacked forbid these methods and all others as well. All methods by which restraint is sought to be imposed are within the constitutional prohibition; all methods of speech are within the constitutional protection.

The displaying of signs or placards may be less expensive and the only means of publicity available to members of a union, but this certainly is no basis for holding that this method is entitled to less of constitutional protection than the more expensive and thereby less available methods of publicity.

That freedom of speech may result in abuse in some cases is not open to doubt, and penalties have been provided for such abuse. The possibility of such abuse was re-

cently recognized by this Court in *Schneider* v. *State*, 60 S. Ct. 146, 84 L. Ed. 115, when it said:

> "Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."

A similar answer must be made to efforts to have the courts pass in advance upon what may be said and to enjoin all future statements which they may regard as improper. But the present case is even stronger because the court not only enjoins improper future statements but all future statements.

II.

A Previous Censorship May Not Control Future Untrue Statements, or All Future Statements Because Prior Statements Are Alleged to Be Untrue.

The injunctions in this case are not based on any holding that future solicitation or exhibition of signs will be untrue. But it would be invalid as a previous censorship even though it should limit itself to future untrue statements. This Court properly said in *Patterson* v. *Colorado*, 205 U. S. 454, 462:

> "The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false."

This statement was repeated with approval in *Near* v. *State of Minnesota*, 283 U. S. 697 (1931), page 714.

Previous censorship may not apply to future false statements. It would appear clear that future truthful utterances may not be enjoined because of alleged untruthful utterances in the past.

Moreover, the permanent injunction entered by the Appellate Court of Illinois in this case is not based on any alleged untruthful statements in the past, but upon a finding that "peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (*i. e.*, where there is not a proximate relation of employees and employer)"; (R. 37); and by dismissal of writ of error the Supreme Court of Illinois sustained this position. (R. 45-47.)

III.

The Scheme of Action by Organized Labor in the Present Case Is Not Unlawful, and Although Unlawful Acts in Seeking Its Accomplishment May Be Enjoined, Separable Lawful Acts May Not Be Restrained.

If a temporary or permanent injunction may be obtained against freedom of expression, as an incident to any injunction forbidding force or violence, there is little left of freedom of speech.

The position of the Supreme Court of Illinois finds some basis in the statement of Dean Roscoe Pound that:

> "A growing number of decisions allow an injunction where the writing or publication is a part of a wrong which would be enjoined of itself." Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. Law Rev. 640 (1916), page 655.

Dean Pound added: "But this would be wrong on Blackstone's theory and also under the view taken in

Brandreth v. *Lance* (8 Paige, 24. N. Y. 1839)." In *Near* v. *State of Minnesota,* 283 U. S. 697, pages 713-714, this Court has approved Blackstone's theory as to previous restraints.

The Supreme Court of Illinois takes the view that there is here an unlawful scheme because (1) no proximate relation of employer and employees exists; (2) the activities of the union will be injurious to the employer; and (3) that if acts approaching violence are admitted, even on the basis of demurrer, all acts become unlawful and may be enjoined by a court of equity.

(1) The absence of a proximate employer-employee relation does not render unlawful the efforts of a labor organization to unionize a shop. Although the Illinois Anti-Injunction Act of 1925 omits the restrictive language of the Clayton Act, the Supreme Court of Illinois has held that it applies only where there is a proximate relation of employer and employee. *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers' Union of Chicago,* 371 Ill. 377 (1939). The construction of a state statute by the highest state court is binding upon this Court; and the state statutory prohibition of injunctions against the matters enjoined in paragraphs (a), (b), (c) and (d) of the present injunction does not apply to the present case, although it would apply if there were a direct employer-employee relation. But a dispute between an employer and a union of non-employee workers in the same industry is not rendered unlawful because it loses the aid of the state anti-injunction law; and the protection of freedom of assembly and of speech comes from the Fourteenth Amendment and not from the state statute. The right to freedom of speech does not depend upon an employer-employee relationship.

Violence established by evidence existed in *American Steel Foundries* v. *Tri-City Central Trades Council,* 257

U. S. 184 (1921). Yet that case, in dealing with non-employees not within the Clayton Act, said as to peaceful persuasion and propaganda, that "It is impossible to hold such persuasion and propaganda, without more, to be without excuse and malicious;" and the court modified the injunction so far as it restrained persuasion, on the ground that the members of a local union and the union itself "have sufficient interest in the wages paid to the employees of any employer in the community to justify their use of lawful and peaceable persuasion to induce those employees to refuse to accept such reduced wages and to quit their employment." (Pages 209, 212-213.)

In that case the Court not only separated lawful from unlawful acts, but it sustained the rights of organized labor to engage in peaceful persuasion and propaganda, without the aid of statutory protection. The decision was not based on constitutional guaranties, but finds definite support in the First and Fifth Amendments.

Union organizations of non-employees were specifically recognized as having a legal right to employ persuasion and propaganda with respect to non-union employers and employees, the Court saying that to render their combination at all effective "employees must make their combination extend beyond one shop."

It sufficiently appears from the pleadings in the present case that the injunctions are in fact primarily directed against local unions because of their actions or anticipated actions with respect to a nonunion shop and nonunion workers in the same industry and within the same territorial area. (R. 1-13, 16-23, 36-39.) The interest of such unions is greater than that in the *Tri-City Central Trades Council* case. Peaceful presentations of propaganda are not unlawful under such conditions and are protected by the constitutional guarantee of freedom of speech.

(2) The fact that the activities of a union may be injurious to the employer does not render them unlawful. When the *Tri-City Central Trades Council* case, quoted above, was in the United States Circuit Court of Appeals, that Court stated briefly and clearly the rule here applicable. It said:

> "Methods may be considered lawful, even though the employer's business is interfered with, because such methods are incidental to the right of the employee, which right should be and is recognized as equal to the right of the employer." (238 Fed. 729, page 733).

A similar view is reflected in the opinion by this Court quoted above.

In *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468 (1937), this Court said:

> "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. * * * It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution." (Pages 478, 482.)

The mere fact of injury to the employer because of the exercise of freedom of speech does not justify a previous restraint upon such freedom.

(3) Freedom of assembly and of speech may not be enjoined because associated with or alleged to have been associated with violence. The purpose of the Illinois Anti-Injunction Act of 1925 was to segregate peaceful conduct from that of violence, and to forbid restraint of peaceful action by injunction. With the narrowed construction by the Supreme Court of Illinois, this statute serves its pur-

pose in case of a labor dispute between employer and employees, but not in a labor dispute between an employer and unions of non-employees. In *Fenske Bros.* v. *Upholsterers International Union*, 358 Ill. 239 (1934), the Court said, at page 260:

> "The mere facts that acts of violence had been previously committed would of itself furnish no justification for enjoining legal acts of peaceful persuasion. There was therefore no basis for restraining the displaying of the placards and it was error to have done it."

In the *Fenske* case the Illinois Anti-Injunction statute was held to prohibit restraint by injunction of both peaceful picketing and peaceful persuasion, and no difficulty was encountered in the separation of legal from illegal acts. In the present case the Fourteenth Amendment guarantees against restraint of peaceful persuasion by placards or by solicitation, and there is no difficulty in the separation of legal from illegal acts. There was no difficulty in making such a separation in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184 (1921).

In order to sustain the restraint here sought to be imposed upon rights guaranteed by the Fourteenth Amendment, it would be necessary to bring the present case within the language of Mr. Justice Holmes who said that "the most stringent protection of free speech would not protect a man * * * from an injunction against uttering words which have all the effect of force." *Schenck* v. *United States*, 249 U. S. 47 (1919), page 52, quoted with approval in *Near* v. *State of Minnesota*, 283 U. S. 697 (1931), page 716. Similar language is found in *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 417 (1911), page 439. The language in the Gompers and Schenck cases was applied to unlawful conspiracies, and the language referred to was an essential part of the conspiracy.

Here we have no unlawful conspiracy or other unlawful purpose, but rather a valid objective within the language of this Court in the *Tri-City Central Trades Council* case; and we have also admittedly valid portions of the present injunctions restraining the use of force as a means of achieving the lawful objective. The petitioners here seek relief only from a general restraint upon all future peaceful utterances. The right of assembly is necessarily incident to the right of speech which is so involved.

The purpose here is lawful, and has been so recognized by this Court. A statute penalizing peaceful picketing has recently been declared invalid by the Supreme Court of Colorado (*People* v. *Harris*, 91 Pac. (2d) 989); and a similar municipal ordinance of the City of Reno, Nevada, was declared invalid by the Supreme Court of Nevada on November 21, 1939, where the picketing was by members of a union none of whom were employees of the picketed employer. *City of Reno* v. *Second Judicial District Court*, 95 Pac. 2d 994. Here we have an injunction which not only restrains peaceful picketing, but which goes much farther in restraint of freedom of speech and assembly. In speaking of the guarantee of freedom of speech "to every person" by the Constitution of Illinois, the Supreme Court of that state properly said:

> "If a court of equity has power to restrain and punish members of a labor union from speaking, writing or publishing on the subject of a dispute between the union and the employer, then the members of the labor union are not such persons as are within the quoted constitutional provision." *Vulcan Detinning Co.* v. *St. Clair*, 315 Ill. 40, page 47.

IV.

The Fourteenth Amendment Protects Freedom of Speech and Assembly from State Judicial Impairment as Fully and Completely as from Impairment by Other Departments of the State Government.

The municipality is an agent of the state and its action is state action. The court is an instrumentality of the state, and its action is state action. The Fourteenth Amendment forbids any state to deprive of life, liberty or property, without due process of law. The Court must look to the result and not to the instrumentality of the state which accomplishes the result. "Whoever, by virtue of a public position under a state government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition, and as he acts in the name of and for the state, and is clothed with the state's power, his act is that of the state. This must be so or the Constitutional provision has no meaning." *Ex parte Virginia,* 100 U. S. 339 (1880).

The due process clause of the Fourteenth Amendment has been systematically construed to apply to all state action, whether legislative, executive or judicial. This Court has carefully protected individual rights against impairment by state judicial action. *Tumey* v. *State of Ohio,* 273 U. S. 510; *Brown* v. *State of Mississippi,* 297 U. S. 278; *Chambers* v. *State of Florida,* 60 S. Ct. 472, 84 L. Ed. 419.

It may, however, be argued that, in protection of freedom of speech and assembly, the Fourteenth Amendment goes no farther than the First Amendment, and that the First Amendment protects only against restraint by Congress and not by other departments of government. It is

true that the First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech or of the press; or the right of the people peaceably to assemble." But by the Fifth and Fourteenth Amendments these rights are guaranteed against impairment by any department of either national or state government. The due process clause of the Fourteenth Amendment applies to any state action; and it seems clear that this Court would have reached the same result in *Near* v. *State of Minnesota,* 283 U. S. 697, had there been no state statute and had the state court sought to impose the same "previous restraint" upon the basis of a claimed equity jurisdiction.

The clause of the Fourteenth Amendment with respect to the privileges and immunities of citizens of the United States provides that no state "shall make or enforce any law which shall abridge" such privileges, and does not limit itself to the making of a state statute. The term "law" is not limited as in the contract clause, but has the wider application given to it in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

But it may be urged that the determination of labor controversies and of the legality of actions in connection therewith is properly a matter of state regulation and that this Court should therefore follow restrictive decisions of state courts, even though such decisions may curtail freedom of speech and of assembly as recognized by this Court under the Fourteenth Amendment. If this Court were bound by the determinations of state courts as to what constitutes due process of law under the Fourteenth Amendment, review of such determinations by this Court would be useless.

Briefly summarized, the argument here is that a state court may, by calling an act unlawful, be permitted to withdraw it from the protection of the Fourteenth Amend-

ment. At the expense of some duplication, the result of such a position may be indicated.

In the present case and in *Meadowmoor Dairies* v. *Milk Wagon Drivers Union,* 371 Ill. 377, the Supreme Court of Illinois takes the view that any solicitation in a controversy between an employer and a labor union is unlawful unless there is an employer-employee relation between the parties; that such solicitation is an unlawful interference with property rights; and that no protection is afforded in such a case by the guarantees of freedom of speech and of assembly.

This Court has said that members of a local union not employees "have sufficient interest in the wages paid to employees of any employer in the community to justify their use of lawful and peaceable persuasion to induce those employees to refuse to accept such reduced wages and to quit their employment." *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 212-213.

Under the view taken by the Supreme Court of Illinois, the injunction provisions here in issue are sustained; under the view taken by this Court, they would be violative of the Fourteenth Amendment. Which is to govern? Is each state to determine the limits of freedom of speech and of assembly?

Under the view of the Illinois Supreme Court, non-employee solicitation which may interfere with or injure the employer's business is unlawful, and freedom of speech does not authorize such solicitation in any manner. In *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468, 478, 482, this Court took the position that such solicitation was not unlawful, and that "members of a union might, without special statutory authorization by the state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." Attention

should be called to the fact that in the *Senn* case, as here, "Neither Senn or any of his employees, was at the time this suit was begun a member of either union, and neither had any contractual relations with them." (301 U. S., at p. 473.) Here again is a clear disagreement between this Court and the state court as to what is a lawful use of the right of free speech.

Certain elements of violence having been admitted in the present case by a motion equivalent to a demurrer, future peaceful solicitation may be enjoined under the law as declared by the Supreme Court of Illinois, and any solicitation is tantamount to force because, under the view of the Supreme Court of Illinois, solicitation in any labor controversy not involving an existing employer-employee relation between the parties is unlawful. Attention has already been called to the fact that the rulings of this Court sustain the right of non-employees to seek by peaceable persuasion to improve the conditions as to wages or otherwise with respect to non-union employers and employees. And although previous violence by non-employees had been clearly shown by evidence, this Court held it improper to enjoin future "lawful and peaceable persuasion." *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, pp. 212-213.

Upon the issue as to whether future acts of peaceful persuasion may be enjoined because there may have been prior acts of violence, there seems to be a positive conflict of views between this Court and the Supreme Court of Illinois.

Here again attention should be called to the fact that acts of violence clearly existed in the *American Steel Foundries* case and that here admission of violence was only by motion to dismiss. And attention is further called to the fact that the permanent injunction here at issue

is based, not upon violence, but upon a finding of the Appellate Court of Illinois, affirmed by the State Supreme Court, that "peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (*i. e.*, where there is not a proximate relation of employees and employer)." (R. 37.)

It is urged that peaceful solicitation and the encouragement of such solicitation are but parts of an unlawful scheme, and are enjoinable for that reason. This brings us back to the question as to whether peaceful and otherwise lawful acts by non-employees are unlawful in a labor controversy. Although appearing in the same injunction as are restraints on violence, the peaceful acts here in issue are here enjoined not as parts of a scheme but as acts separate and independent of any acts of violence. That it is not necessary to enjoin peaceful solicitations in order to restrain violence is clearly recognized by the Supreme Court of Illinois. (See page 26.)

If this Court should regard it as its duty to follow the state courts, each state court may set its own standards as to what conduct is unlawful and beyond the protection of the federal constitutional guarantee of freedom of speech and of assembly, and this Court would be bound by such standards. This would mean that in the present case this Court would abandon its views, and accept the Illinois Court's views, as to the unlawfulness of (1) peaceful solicitation by non-employees in a labor controversy; (2) injury to the employer's business incident to such peaceful solicitation; and (3) future peaceful persuasion where there has in the past been an element of force or violence. These are unlawful under the state judicial standard in Illinois, and are lawful under the standards set by this Court. The state court finally determines what is the law of the state, but it cannot

decide finally whether the law so determined infringes rights guaranteed by the Constitution of the United States, nor can it establish controlling standards for the determination of the scope of such rights. Without a power of final determination of these rights by this Court "the Constitution of the United States would be different in different states, and, might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states." *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 348.

It is true that differing standards with respect to labor controversies have been adopted in the several states by judicial decisions or statutes, or by the two combined. The courts of Illinois and Ohio (*Crosby* v. *Rath,* 136 Ohio St. 352) may be unitedly of the view that peaceful solicitation is unlawful except where there is a proximate employer-employee relation, whereas other courts adopt the contrary view, but it is for this Court to determine the scope of free speech and of assembly in such peaceful solicitation, and it has determined adversely to the Illinois Court: Where peaceful solicitation by non-employees is held lawful, it is commonly said that the resulting injury to the employer is incidental and must be endured. *People* v. *Harris,* 104 Colo. 386, 392-394, 91 Pac. (2d), 989, and cases cited in recent unreported decision by the same court in *Denver Local Union* v. *Perry Truck Lines* (March 18, 1940.) Here again it is for this Court to determine the scope of free speech and of assembly, and this Court has, adversely to the Illinois court, held that such solicitation is lawful and that it is not rendered unlawful by resulting injury to the employer. *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468.

V.

The Balancing of Constitutional Rights Sustains Freedom of Speech and of Assembly in This Case.

Much is said by the Supreme Court of Illinois about co-equal constitutional rights which must be harmonized. To permit a previous judicial censorship of the right of speech will not only violate the principles previously adhered to by this Court, but will leave no right of free speech to be harmonized with other constitutional rights.

Petitioners contend that in the present case the objective is lawful, and that the means of its accomplishment through peaceful solicitation are lawful and are improperly enjoined by the first four paragraphs of the injunctions in this case. There is not a conflict between property and individual rights. Here as in other cases the individual rights must be exercised within proper limits, and there is a remedy for the abuse of freedom of speech. But where the purpose is lawful and the means of its accomplishment are lawful, this Court has properly taken the position in the *Senn* and *Schneider* cases that an injury incident to the exercise of individual rights may not defeat these rights.

That injury may result from abuse of freedom of speech in any case is recognized in the recent case of *Schneider* v. *State*, 60 S. Ct. 146, 84 L. Ed. 115; and that the same principle applies in labor controversies as elsewhere is made clear by the facts of the *Snyder* case which was decided with *Schneider* v. *State*.

The harmonizing of co-equal constitutional rights, referred to by the Supreme Court of Illinois, is accomplished by a restraint upon force or violence. But where the purpose is lawful, even though its accomplishment

may be injurious, it may not be restrained by a previous censorship of freedom of speech, although there may be and is a remedy for the abuse of such freedom.

In conclusion, attention is called to the fact that this petition in no way seeks to protect violence, but rather to discourage violence or force. The suppression of free speech does not suppress but encourages violence.

Respectfully submitted,

WALTER F. DODD,
DANIEL D. CARMELL,
Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. [redacted] 56

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

REPLY BRIEF.

WALTER F. DODD,
DANIEL D. CARMELI,
Attorneys for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO 56

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 929.

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

REPLY BRIEF.

MAY IT PLEASE THE COURT:

The brief of Respondents in opposition to this petition discusses the merits of the case, and finds no basis for an argument that the writ should be denied.

In reply it is not possible to follow the order of Respondents' brief, and it is unnecessary here to repeat what has been said in Petitioners' original brief. Statements by Respondents regarding the Illinois Anti-Injunction Act of 1925 are immaterial (Respondents' Brief, pp. 11, 22), because this Court must accept the state court's restrictive construction of that act; but to avoid a misunderstanding, it must again be stated that the Illinois act omitted the restrictive provisions of the Clayton Act.

The Issue.

This case involves an undenied restraint upon peaceful speech and peaceful assembly. This restraint which is imposed by injunctions of state courts is sought to be justified on the grounds (1) that the objective of changing standards in a non-union shop, by action of union non-employees, is unlawful under the law of Illinois; (2) that this Court is under a duty to apply the Illinois law in this case, and that, under that law the objective being unlawful, all acts of peaceful speech or assembly in aid of such objective are unlawful; (3) that if acts of violence are employed in aid of a lawful objective the whole plan becomes unlawful, and all peaceful acts in connection therewith may be enjoined; (4) that the harmonizing of constitutional rights requires the protection of the employer from injury by picketing or solicitation conducted by persons having no employee relation with him; and (5) that the protection of speech and assembly under the Fourteenth Amendment applies only to restraint by the legislative department of the state government.

Counsel for Respondents state that: "This case involves solely a question as to whether or not a trade union can compel plant unionization against the will and desires of the employees," (Brief, p. 12), and allege without basis that the unionization of the shop could have no relation to wages, hours, working conditions or representation of employees. (Brief, p. 4.)

The issue in fact resolves itself into the single question as to whether a state court may by injunction restrain or in fact forbid peaceful speech and peaceful assembly with respect to a labor dispute where there is no proximate relation of employer and employee.

Petitioners contend that the Fourteenth Amendment protects their right freely to speak and to assemble in

peaceful effort to "make their combination extend beyond one shop," even though there is no proximate relation of employer and employee between the parties. Respondents deny such protection.

Validity and Effect of Judicial Restraint.

Although they allege that the restraints here imposed by injunction are within the construction of the Fourteenth Amendment by this Court, Respondents' primary argument is that the Fourteenth Amendment does not protect freedom of speech and of assembly against state judicial restraint (Respondents' Brief, pp. 20-22), and that it is the duty of this Court to follow state judicial decisions as to the common law of the state, even though such decisions restrict rights guaranteed by the Fourteenth Amendment. (Respondents' Brief, pp. 14, 16, 18.) This argument is sufficiently discussed in Petitioners' original brief, pages 28-33.

In addition, however, it is proper to discuss certain distinctions between restraint of a legislative character and judicial restraint. This Court has recently said that legislative restraints should be tested on their face and not by the facts of particular cases arising thereunder. The Court said in *Thornhill* v. *State of Alabama*, 60 S. Ct. 736, 84 L. Ed. 659, 663:

> "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. * * * It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."

The present case involves an injunction issued in a specific case, but presents also the issue as to whether certain clauses of the injunction are void on their face, without consideration of the facts. The permanent injunction is clearly capable of such consideration, because it is based

upon a finding that peaceful picketing and peaceful persuasion are unlawful and, that the employer is entitled to obtain a judicial restraint where a proximate relation of employees and employer is absent (R. 37).

Respondents seek to minimize the effect of the statement in the decree for permanent injunction that "peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (*i. e.*, where there is not a proximate relation of employer and employee)" and that "the appellants have *therefore* maintained their complaint," (R. 37) by quoting the language in part and by omitting the word "therefore" (Respondents' Brief, p. 4). That the decisions in this case and in the Meadowmoor case were based on the absence of an employer-employee relation rather than on alleged violence or untruth is made clear by an explanatory statement in the recent case of *Ellingsen* v. *Milk Drivers' Union*, quoted later in this brief.

Respondents suggest that the statutes and ordinances which have been held invalid have restrained speech and assembly more generally than the injunction in the present case. (Respondents' Brief, p. 14.) But the terms of the injunction here involved are much more restrictive than the terms of such ordinances and statutes.

It is conceded by Respondents that if the various prohibitions in the injunction issued by the Illinois Court were contained in a legislative act, it would on its face be invalid. Can it be said that the courts can violate the Fourteenth Amendment and the legislature may not? This would grant immunity to one branch of the government and destroy the effectiveness of the Fourteenth Amendment.

Judicial restraint is in fact much more effective than legislative restraint. It is true that a separate injunction is required in each case; but the Supreme Court of Illinois has in the present case prescribed the pattern of such an injunction, and has made it the duty of trial courts to issue

such an injunction upon a showing of absence of an employer-employee relationship. That this is the position of the Supreme Court of Illinois is made certain by the explanatory statement of that court in the recent *Ellingsen* case, quoted later in this brief.

The restraint by injunction is under this view a matter of right, and the inferior courts have no discretion. The Appellate Courts of Illinois have necessarily applied the law as established by the state Supreme Court. *Hendrickson Motor Truck Co.* v. *International Association of Machinists,* 301 Ill. App. 608; *Jaffe* v. *Auto Mechanics Local,* 301 Ill. App. 624. And when state law governs, the principles of this case and of the *Meadowmoor* case, as explained in the *Ellingsen* case, will be controlling in the federal courts if the present decision stands. *Lake Valley Farm Products* v. *Milk Wagon Drivers' Union,* 108 Fed. (2d) 436, 443, in which writ of certiorari has been granted by this Court (No. 770).

Since the original opinion of the Supreme Court of Illinois in the present case (June 19, 1939), injunctions substantially identical with that here involved have been obtained in practically every labor controversy in Illinois where the proximate relation of employer and employee was absent; and a conservative estimate of the number of such injunctions would indicate at least one hundred in the state as a whole, and at least fifty of this number in Cook County.

With reference to restraint by injunction, it should also be indicated that violations are punishable by summary proceedings for contempt, and that more effective enforcement is thus possible, without the necessity of according the accused the ordinary safeguards of the judicial process.

Freedom of Speech and of Assembly Are Not Limited to Employer and Employee in a Labor Dispute.

The permanent injunction issued by the Appellate Court in this case was based on a statement that it and the Supreme Court of Illinois had held that "peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (*i. e.*, where there is not a proximate relation of employees and employer.)" (R. 37.)

The opinions in the state Appellate and Supreme Courts both make it clear that peaceful speech and assembly may not be restrained where there is an employer-employee relationship even though there may also be violence or untruth (298 Ill. App. 63, 372 Ill. 91; R. 26; and see quotation on page 26 of original brief); and that such speech and assembly are unlawful and may be restrained where there is not an employer-employee relationship even though there may be no violence or untruth.

In reply, it is sufficient to call attention to the contrary view of this Court in *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, and *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468. Relevant quotations from these cases appear in Petitioners' original brief, pp. 24, 30-31. The statement in the *Senn* case has recently been approved by this Court in *Thornhill* v. *State of Alabama,* 60 S. Ct. 736, 745, 84 L. Ed. 659, 667. And attention should again be called to the fact that in the *Senn* case this Court explicitly said that neither Senn nor any of his employees were members of or had any contractual relation with the union.

Respondents make no effort to distinguish the Senn case but say that the *Tri-City Council* case is distinguishable because the dispute was in a small community and the members of the trade union were once employees and were prospective future employees. (Respondents' Brief, p.

16.) These statements are not supported by the decision, and run directly counter to the Court's statement that "employees must make their combination extend beyond one shop." Relevant portions of the opinion in this case may be found at page 24 of Petitioners' original brief. And in *Carlson* v. *State of California,* 60 S. Ct. 746, 84 L. Ed. 668, this Court recognizes not only the rights of union non-employees but also the rights of "disinterested persons (who might be hired to carry signs)." This Court has recently said that: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." *Thornhill* v. *State of Alabama,* 60 S. Ct. 736; 84 L. Ed. 659. And this freedom of discussion is not limited to those having a proximate relation of employer and employee.

Injury to the employer is the primary basis in the state court for enjoining free speech and free assembly where there is no employer-employee relation. It is conceded that, under a valid Illinois statute, the employer must suffer the injury from free speech and free assembly where there is an employer-employee relation, and that this applies to all peaceful action, even though there may have been acts of force or violence for which a remedy exists. (See quotation on page 26 of original brief.)

Here, as in the *Carlson* case, "the carrying of signs and banners * * * is a natural and appropriate means of conveying information on matters of public concern"; and here, as in the *Senn* and *Schneider* cases, the peaceful exercise of freedom of speech and of assembly are not limited by the fact that there may be incidental injury to others. Relevant quotations from these cases appear at pages 21 and 25 of Petitioners' original brief. The view of this Court has been clearly stated in the recent case of *Thorn-*

hill v. *State of Alabama*, 60 S. Ct. 736, 745; 84 L. Ed. 659, 667:

> "It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportuity to test the merits of ideas by competition for acceptance in the market of public opinion."

Allegations of Violence Do Not Support Restraints on Peaceful Speech and Assembly.

In the Supreme Court of Illinois the only issue in review was that as to the validity of paragraphs (a), (b), (c) and (d) of the injunction. (R. 14, 38.) It was contended there and is contended here by Petitioners that such paragraphs are void on their face, in that they enjoin peaceful speech and assembly not as parts of a scheme but as acts separate and apart from acts of violence. If such provisions can be sustained because associated with restraints upon acts of violence, freedom of speech and of press are dependent upon the form of an injunction.

But attention must also be called to the fact that elements of force and of falsity and maliciousness are exaggerated by Respondents. As indicated in the petition, facts which are directly alleged are admitted by the motion to dismiss in this case, but conclusions of the pleader

are not admitted. (Petition, p. 3.) It is admitted that members of the union were not employees of respondent Swing and that signs carried by pickets bore the words: "This Beauty Shop is unfair to Organized Labor." That they were false and malicious is a conclusion of the pleader based upon the words quoted above and upon the fact that such words were used by persons who were not employees of respondent Swing. Respondents make the obviously incorrect statement that clause (c) of the injunctional order only restrains the quoted legend (Respondents' Brief, p. 6), and assert that this statement was libelous. (Respondents' Brief, pp. 5, 17, 18.) The ground for this statement is the absence of an employee-employer relation, Respondents saying that, should such a relation be established, "the present libelous statements would thereupon become statements of truth." (Respondents' Brief, p. 17.) This is merely another way of saying that there is not freedom of speech as to unfairness unless an employer-employee relation exists. The malice, libel and untruth arise, not because of the statement, but because of the relationship of the parties. But this Court has taken the view that freedom of speech equally applies to the employee and the non-employee.

Attention should again be called to the fact that the injunctions here in issue forbid all future statements, irrespective of their truth or falsity. This matter is discussed in the original brief, pages 19-22.

Throughout the opinion of the Supreme Court of Illinois in this case is implicit the theory that libel, force and untruth are to be construed as parts of any labor controversy in which an employer may suffer injury from action by others than his employees. The injury itself under such conditions is regarded as the result of force and libel. This view is more explicitly stated in a later opinion of that court. The opinion in the present case is largely

based on *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers' Union*, 371 Ill. 377, in which there was detailed testimony as to violence. In the recent case of *Ellingsen* v. *Milk Wagon Drivers' Union* (April 10, 1940), as yet unreported, the Supreme Court of Illinois said as to the *Meadowmoor* case:

> "In that case there was some evidence of violence, but an examination of the opinion will disclose that the issue of violence was not the turning point of the decision."

With respect to the issue here involved the Court said in the *Ellingsen* case:

> "In the *Meadowmoor case* the question of the right of free speech, which is earnestly urged here, was considered. Relying upon cases of the Federal courts, it was held that the constitution does not protect in the use of words which may have all of the effects of force uttered for the purpose of injuring the business of another (*Gompers* v. *Buck's Stove and Range Co.* 221 U. S. 418, 35 L. Ed. 796); and thus, even though the picketing be peaceful, if, in accordance with a concerted purpose to injure the business of another, words are used which, through fear or disturbance amount to force, such acts are subject to restriction by injunction."

It is made clear that the words would not be subject to injunctional restraint if uttered by an employee. Here again the absence of an employer-employee relation is the basis of restraint, and force is held to be constructively an element in peaceful action, where that relationship does not exist. The right to a permanent injunction in the present case is explicitly based upon the absence of such a relationship (R. 38); and this basis is confirmed by the Supreme Court of Illinois in granting motion to dismiss writ of error on the ground that its opinion on previous appeal settled all the rights of the parties. (R. 45-46.)

Even though certain elements of violence may have been admitted by the motion to dismiss, and even though these

elements should be regarded as a basis for the permanent injunction entered by the state Appellate Court and confirmed by the state Supreme Court, there is still no basis for an injunction restraining peaceful exercise of free speech and free assembly. Clearly the first four paragraphs of the injunction impose such restraint, and clearly they are distinct and separate restraints, not dependent upon those against violence. The Supreme Court of Illinois has found no difficulty in separating acts of peaceful persuasion from [illegible] of violence where there is an employer-employee rela[illegible] (Original Brief, p. 26), and the difficulty of separation is no greater where this relationship is absent, unless this Court is to adopt the view of the Supreme Court of Illinois, that the absence of such relationship in itself constitutes libel and force. And in the *Tri-City Central Trades Council* case this Court found no difficulty in separating lawful from unlawful acts where there was no employer-employee relation. (Petitioners' Brief, pp. 24, 31.)

Respectfully submitted,

WALTER F. DODD,

DANIEL D. CARMELL,

Attorneys for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 56

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

BRIEF FOR PETITIONERS.

WALTER F. DODD,
DANIEL D. CARMELL,
Attorneys for Petitioners.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO 56

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Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 56.

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

BRIEF FOR PETITIONERS.

The Opinions Below.

Upon the temporary injunction herein involved, the opinion of the Illinois Appellate Court for the First District is reported in 298 Ill. App. 63, and the opinion of the Supreme Court of Illinois is reported in 372 Ill. 91. The opinion and dissent in the Supreme Court of Illinois are printed in full in the record. (R. 24-33.) The permanent injunction, which is the same as the temporary injunction, except for certain findings and for a broader statement as to applicability, was entered by the Illinois Appellate Court without opinion, (R. 36-39), and writ of error with respect thereto was dismissed by the Supreme Court of Illinois without opinion. (R. 45-47.)

Jurisdiction.

A federal constitutional issue as to freedom of speech and of assembly under the Fourteenth Amendment was presented to and adversely disposed of by the Supreme Court of Illinois in its opinion upon the temporary injunction. (R. 26.) In writ of error to the Supreme Court of Illinois upon the permanent injunction this federal issue was preserved. (R. 39.) Certiorari from this Court was originally sought to review the temporary injunction, on the grounds (1) that the highest state court had left nothing to the judicial discretion of the lower court (*Rio Grande Western Railway Co.* v. *Stringham,* 239 U. S. 44), and (2) that to deny certiorari with respect to the temporary injunction would leave the petitioners "powerless to avert the mischief of the order." (*Perlman* v. *United States,* 247 U. S. 7, recently discussed in *Cobbledick* v. *United States,* 309 U. S. 323.) Certiorari having been denied with respect to a review of the temporary injunction (1939 Term, No. 615), the issue with respect thereto is presented at the first opportunity open to petitioners (*Gant* v. *Oklahoma City,* 289 U. S. 98, 100), and all issues both as to the temporary and the permanent injunctions are properly before this Court.

Jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code.

Statement of the Case.

This case involves the validity of paragraphs (a), (b), (c) and (d) of injunctions the provisions of which are set forth at page 6 of this brief. The validity of such paragraphs is contested on the ground that they restrain freedom of speech and of assembly in violation of the Fourteenth Amendment to the Constitution of the United States. No issue was made in the Appellate or Supreme Courts of

Illinois or is now made as to the validity of the provisions of the injunctions so far as they enjoin acts of violence. This is made clear by the statement of the Supreme Court of Illinois that "it will not pick and choose" (R. 28), and by the statement in dissent that "this case does not involve the question of restraining violence." (R. 29.) Paragraphs (a), (b), (c) and (d) are identical in both the temporary and permanent injunctions, and their scope is affected by paragraph (h) which is also identical in the two injunctions.

A temporary injunction, in the terms set out on page 6 of this brief was granted by the Circuit Court of Cook County, Illinois, on July 17, 1937, upon the basis of complaint by Swing and his employees. (R. 13-14.) The complaint alleged an effort upon the part of the defendant unions and their members to unionize Swing's beauty parlor, whose employees were not members of the union; that violence had been used in picketing and solicitation; and that pickets carried signs that "This Beauty Shop is Unfair to Organized Labor"; and that such signs were false and malicious. (R. 1-13.)

Subsequent to the issuance of the temporary injunction, the defendants barbers and hairdressers unions filed sworn answers, on July 27, 1937, and August 26, 1937. (R. 16, 18.) The answer of defendant Hairdressers and Cosmetologists union denied acts of violence; alleged that the signs displayed by pickets were true and that there was never more than one picket in front of or in the vicinity of Swing's shop; alleged that more than ninety per cent of some 200 beauty shop operators employed in the area were members of the union; admitted that Swing's employees were not members of the union but alleged that they were threatened with discharge if they joined the union; and alleged a right to picket or unionize Swing's shop and to obtain for its employees wages and hours commensurate with that of other employees. (R. 18-23.)

Thereafter, on January 20, 1938, the Circuit Court of Cook County, Illinois, on motion of defendants to dissolve the injunction and dismiss the cause for want of equity on the face of the complaint, dissolved the injunction, struck the complaint for want of equity on its face, set a day for the assessing of damages, and gave plaintiffs leave to file an amended complaint. (R. 15.) Plaintiffs elected to stand on their complaint, and on February 15, 1938, the Circuit Court of Cook County struck the complaint for want of equity on its face, dismissed the cause, and assessed damages against the plaintiffs. (R. 15, 16.)

The effect of a motion to dismiss as an admission of facts well pleaded in the complaint is discussed at pages 27-29 of this brief. For the purposes of the motion such facts were admitted.

The plaintiffs appealed to the Appellate Court for the First District of Illinois. That Court on December 21, 1938, without remandment of the case, reversed, annulled and set aside the orders of the Circuit Court bearing date of January 20, and February 15, 1938, and taxed costs against appellees, who were defendants below. (R. 23-24.) The Appellate Court granted leave to appeal to the Supreme Court of Illinois by a certificate of importance. (R. 24.) The Supreme Court of Illinois entered judgment on June 19, 1939, affirming the judgment of the Appellate Court and taxing costs against appellants in that Court, who were the defendants in the trial court. (R. 33.) The Supreme Court of Illinois denied rehearing on October 13, 1939. (R. 34.)

The opinion of the Supreme Court of Illinois appears in 372 Ill. 91, and is set forth in full in the record, together with the dissent therein. (R. 24.) The opinion is primarily based on the view that allegations of violence were admitted by the motion to dismiss, and that all provisions of the temporary injunction must be treated as a whole.

The annulment of the orders of the trial court, which were based on the granting of a motion to dismiss, necessarily constituted a denial of that motion, and a final disposition of all admissions made thereby. Further judicial action was thereafter based upon the pleadings, and involved only such admissions as are made in the sworn answers of defendants who are petitioners here. (R. 16, 18.)

Upon remandment of the case by the Supreme Court of Illinois, a decree was entered by the Appellate Court of Illinois, First District, on February 16, 1940, making permanent the terms of the injunction originally issued by the trial court and applying such injunction not only to the unions and their members but "to all other persons, as agents, representatives, members, attorneys of the defendants and all persons acting in concert with said trade union defendants and individual defendants." The decree of the Appellate Court is set out in full in the record. (R. 36-39.)

Two provisions of the decree of the Appellate Court emphasize the issue here made by petitioners:

(1) Paragraph 3 of the decree specifically finds that the right to injunctive relief is based upon the absence of an employer-employee relationship between the parties.

(2) The injunction is expressly made applicable, not only to the defendants, but to "all persons acting in concert with said trade union defendants."

With respect to the paragraphs of the permanent injunction forbidding peaceful action which are here contested by petitioners, the finding by the Appellate Court that the right to injunctional relief arises out of the absence of an employer-employee relationship removes from the case all elements of force or of alleged untrue signs. And the dismissal of writ of error by the Supreme Court of Illinois constitutes an affirmance of the finding by the Appellate Court. This matter is further discussed at pages 24-27 of this brief.

A writ of error was sued out in the Supreme Court of Illinois to review the validity of the decree entered by the Appellate Court making permanent the terms of the injunction here involved. Defendants in error moved to dismiss the writ of error on the ground that all the rights of the parties had been finally settled on previous appeal, and that plaintiffs in error were not entitled to a further review. (R. 43-45.) This motion was granted by the Supreme Court of Illinois and writ of error dismissed on April 4, 1940. (R. 46-47.)

The acts enjoined by identical terms of the temporary and permanent injunctions are as follows:

(a) Picketing or maintaining any picket or pickets at or near the place of business of plaintiff (Swing) at 5558 West North Ave.

(b) Patrolling or congregating in front or in the vicinity of plaintiff's business, in furtherance of picketing;

(c) Exhibiting or causing to be exhibited any sign or placard or other matter in front of or in the vicinity of plaintiff's business, designating the plaintiff's business as being nonunion or unfair to organized labor, or as refusing to permit collective bargaining, or designed to induce or influence persons not to enter plaintiff's place of business;

(d) Soliciting, inducing, or influencing or attempting to induce or influence persons, employees or prospective employees of plaintiff not to enter his place of business or do business with him;

(e) Menacing, intimidating, threatening or harassing persons employed by or persons going to and from plaintiff's place of business; from calling plaintiff and members of plaintiff's family and plaintiff's employees vile names and shouting offensive epithets;

(f) Threatening, coercing, intimidating or assaulting the employees of the plaintiff or harassing the employees of the plaintiff, while on their way to and from their homes to the place of business;

(g) Threatening, coercing, intimidating or assaulting prospective employees, or persons seeking employment from the plaintiff, and from preventing by threats,

coercion or intimidation, such prospective employees and persons seeking employment, from entering plaintiff's place of business;

(h) Advising, encouraging or assisting or participating in the doing of any of the things herein forbidden. (R. 14, 38.)

Paragraphs (a), (b), (c) and (d), which are here in issue, prohibit officers and members of local organized groups of barbers and hairdressers and all other members of the American Federation of Labor and of the Chicago Federation of Labor (petitioners here) from (a) picketing or maintaining any picket or pickets at or near the place of business of respondent Swing, (b) from patrolling or congregating in front of or in the vicinity of respondent's place of business, in furtherance of picketing, (c) from giving publicity to their view that the beauty shop of respondent Swing is unfair to organized labor, through the exhibition of signs or placards "designed to induce and influence persons not to enter plaintiff Swing's (respondent's) place of business", or (d) from soliciting persons not to enter his place of business or to do business with him; even though the acts of giving publicity or soliciting or of picketing or patrolling may be peaceful and even though the future statements upon signs or placards may be in no sense untrue.

Paragraph (h) of the injunctions supplements paragraphs (a), (b), (c) and (d) and restrains "advising, encouraging or assisting or participating in the doing of any of the things herein forbidden." The permanent injunction is, in addition, specifically applicable to "all persons acting in concert with said trade union defendants and individual defendants." (R. 38.)

Paragraph (a) is limited to acts "at or near the place of business of plaintiff," and paragraphs (b) and (c) are limited to acts "in front of or in the vicinity of plaintiff's business." Paragraph (d) is not limited to specific per-

sons, time or place but applies to private or family conversations, as well as to all influence exerted in public or in private.

The breadth of paragraph (d) of the injunctions is such as to prohibit a local barbers' union as a member of the Chicago Federation of Labor from stating its views regarding the respondent at any meeting of that organization.

All members of the Chicago Federation of Labor and of the American Federation of Labor are subject to the terms of this injunction; and every act of solicitation or encouragement of solicitation on the part of any such member is subject to punishment as contempt of court. Neither the Chicago Federation of Labor nor the American Federation of Labor nor local unions nor individual members of such organizations may attempt in any manner to unionize present or future employees of respondent Swing, or to discourage their members or others from patronizing him. The permanent injunction extends these restraints "to all other persons, as agents, representatives, members, attorneys of the defendants and to all persons acting in concert with said trade union defendants and individual defendants."

Assignment of Error.

The Supreme Court of Illinois is in error in this case in that portions of injunctions sustained by it restrain freedom of speech and of assembly in violation of the due process of law clause of the Fourteenth Amendment.

Summary of Argument.

This case involves the validity of injunctions, temporary and permanent, which forbid all persons, whether members of labor organizations or not, to engage in or to aid in any manner, whether through speech, assembly, the

press or otherwise, in a labor dispute where the parties to the dispute are not in the proximate relation of employer and employees. The argument of petitioners against the validity of these injunctions may best be summarized by indicating the arguments that may be used in their defense.

The restraints imposed by the injunctions are sought to be justified on the grounds (1) that, under the law of Illinois, any effort by laborers, organized or unorganized, to bring pressure to bear upon employers with respect to terms and conditions of employment is unlawful where there is no proximate employer-employee relation between the parties; (2) that the whole plan being unlawful, methods which otherwise may be lawful have the force and effect of violence because of the unlawful objective, and that peaceful acts in connection therewith may therefore be enjoined, and may not under such conditions be separately permitted, although they would be so permitted if a proximate employer-employee relation were present; (3) that this Court is under a duty to apply the Illinois law in the present case, and that the objective being unlawful under the laws of Illinois, all acts of peaceful speech or assembly in aid of such objective are unlawful; (4) that the harmonizing of constitutional rights requires the protection of the employer from injury by picketing or solicitation conducted by persons having no employee relation with him; and (5) that the protection of speech and assembly under the Fourteenth Amendment applies only to restraint by the legislative department of the state government, and that therefore these guarantees may not be applied to invalidate injunctions issued by state courts.

Petitioners' argument is devoted to a refutation of these defenses.

ARGUMENT.

I.

THE CONSTITUTIONAL GUARANTEES OF FREEDOM OF SPEECH AND OF ASSEMBLY APPLY TO A LABOR DISPUTE, AND FORBID THE PRIOR CENSORSHIP OF UTTERANCES IN SUCH A DISPUTE.

At the last term of this Court, it said, in *Thornhill* v. *Alabama,* 310 U. S. 88, 102, that: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution." And in *Carlson* v. *California,* 310 U. S. 106, 112, the Court recognized that "the carrying of signs and banners" is a natural and appropriate means of conveying such information. Prior to the decisions of this Court in the *Thornhill* and *Carlson* cases, similar results were reached in Colorado with respect to an anti-picketing statute (*People* v. *Harris,* 104 Colo. 386, 91 Pac. 2d. 989), and in Nevada with respect to an anti-picketing municipal ordinance (*City of Reno* v. *Second Judicial District Court,* 95 Pac. 2d. 994). The ordinances and statutes here referred to are similar to the injunctions in the present case in that they not merely imposed a prior censorship, but specifically forbade the exercise of freedom guaranteed by the Constitution. But paragraphs (c) and (d) of the present injunctions are much broader than anything in the act and ordinance in the *Thornhill* and *Carlson* cases.

In speaking of the guarantee of freedom of speech "to every person" by the Constitution of Illinois, the Supreme Court of that state properly said:

> "If a court of equity has power to restrain and punish members of a labor union from speaking,

writing or publishing on the subject of a dispute between the union and the employer, then the members of the labor union are not such persons as are within the quoted constitutional provision." *Vulcan Detinning Co.* v. *St. Clair*, 315 Ill. 40, page 47.

It is fully established that previous censorship of the exercise of the right of speech and assembly by means of state statutes or municipal ordinances is violative of the Fourteenth Amendment. *Schneider* v. *State*, 308 U. S. 147; *Near* v. *State of Minnesota*, 283 U. S. 697. Leaving aside for the moment the question whether state judicial restraint stands upon a different basis, it may here be pointed out that the restraint sought to be imposed in the present case falls within the limits established by this Court with respect to state statutes and municipal ordinances.

One of the cases decided with *Schneider* v. *State* is closely parallel with the present case. *Snyder* v. *City of Milwaukee* involved a Milwaukee ordinance forbidding the circulation or distribution of circulars, handbills or other printed matter in streets and other public places. Here we have a similar prohibition by injunction, with the law so applied as to authorize trial courts in Illinois to issue similar injunctions in all other cases. In the Milwaukee case: "The petitioner, who was acting as a picket, stood in the street in front of a meat market and distributed to passing pedestrians handbills which pertained to a labor dispute with the meat market, set forth the position of organized labor with respect to the market, and asked citizens to refrain from patronizing it." Snyder's conviction of violation of the ordinance was reversed by this Court, on the ground that "the ordinance cannot be enforced without unconstitutionally abridging the liberty of free speech." In the present case, any person performing the same acts as *Snyder* in the Milwaukee case will be subject to equal or more serious punishment for contempt of court. If the present injunctions are sus-

tained, the courts of Illinois are authorized to accomplish a result which is violative of the Fourteenth Amendment when undertaken by a municipality in Wisconsin.

In *Hague* v. *C. I. O.*, 307 U. S. 496 (1939) "an ordinance was held void on its face because it provided for previous administrative censorship of the exercise of the right of speech and assembly in appropriate public places." An injunction accomplishing the same purpose through state judicial action should suffer the same fate.

Under the decisions of this Court, previous restraint upon freedom of speech such as that here imposed is clearly improper with respect to newspaper publication, distribution of circulars, the carrying of signs and banners, and house to house solicitation. The injunction clauses here attacked forbid these methods and all others as well. All methods by which restraint is sought to be imposed are within the constitutional prohibition; all methods of speech are within the constitutional protection.

The present injunctions forbid the future exhibition of "any sign or placard or any other matter" "designating the plaintiff's business as being non-union or unfair to organized labor, or as refusing to permit collective bargaining," and "soliciting, inducing or influencing or attempting to influence" any persons "not to enter his place of business or do business with him." (R. 14, 38. Paragraphs (c) and (d).) It is alleged in the complaint that banners previously used stating that Swing's shop was "unfair to organized labor" were false and malicious, but as indicated at page 28 of this brief, this allegation was a conclusion of the pleader, not admitted by motion to dismiss (demurrer), and had basis only in the fact that there was no employer-employee relation between the parties. This gives no basis for enjoining as untrue the continued use of banners previously employed. Moreover,

the permanent injunction entered by the Appellate Court of Illinois in this case is clearly not based on any alleged untruthful statements in the past, but upon a finding that "peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (*i. e.*, where there is not a proximate relation of employees and employer)" (R. 37); and by dismissal of writ of error the Supreme Court of Illinois sustained this position. (R. 45-47.)

In addition, the language of the injunctions does not limit itself to a prohibition of signs and placards theretofore used, but forbids all future use of banners and all future use of any methods of solicitation, no matter how true the statements may be. This Court has said that prior censorship may not apply to future false statements, because this would establish a censorship to determine in advance whether the statements were true. Certainly, no right of the Court to determine the correctness of religious doctrine is implied in *Lovell* v. *City of Griffin*, 303 U. S. 444 or in *Cantwell* v. *Connecticut*, 310 U. S. 296.

This Court properly said in *Patterson* v. *Colorado*, 205 U. S. 454, 462:

> "The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false."

This statement was repeated with approval in *Near* v. *State of Minnesota*, 283 U. S. 697 (1931), page 714.

An injunction cannot be sustained against all future utterances on the ground that some of them may be untrue; and this is particularly true in a case where the only ground of alleged untruth in past statements is the allegation that an employer cannot be unfair to others than his own employees with whom he may have a labor dispute. Moreover, the restriction here imposed applies to all statements irrespective of their truth or falsity.

II.

IN A LABOR DISPUTE, FREEDOM OF SPEECH AND OF ASSEMBLY ARE NOT LIMITED TO EMPLOYER AND EMPLOYEE. THE ABSENCE OF A PROXIMATE EMPLOYER-EMPLOYEE RELATIONSHIP DOES NOT MAKE THE WHOLE TRANSACTION UNLAWFUL AND JUSTIFY INJUNCTIONS BY STATE COURTS AGAINST ALL ACTS IN CONNECTION THEREWITH.

The opinion of the Supreme Court of Illinois sustaining the temporary injunction is based on the principle that any effort by laborers, organized or unorganized, to bring influence to bear upon employers with respect to terms and conditions of employment, when there is no proximate employer-employee relation between the parties, is unlawful, and that therefore all action in connection therewith is unlawful and has all the effects of force. In its opinion, the Supreme Court quoted and adopted the statement of issues by the Appellate Court, as follows: "The question presented for determination is whether a labor union, in which none of its members are present, past or expectant employees of an employer, has a right to picket his place of business for the purpose of compelling employees, who do not wish to join a union, to do so." (R. 26.)

The permanent injunction issued by the Appellate Court in this case was based on a statement that both that Court and the Supreme Court of Illinois had held that "peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (*i.e.*, where there is not a proximate relation of employees and employer.)" (R. 37.)

Throughout the opinion of the Supreme Court of Illinois passing upon the temporary injunction in this case is implicit the theory that libel, force and untruth are to be construed as parts of any labor controversy in which an employer may suffer injury from action by others than his

employees. The injury itself under such conditions is regarded as the result of force and libel, even though all acts are in themselves peaceful. This view is more explicitly stated in a later opinion of that court. The opinion in the present case is largely based on *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers' Union*, 371 Ill. 377, in which there was detailed testimony as to violence. In the recent case of *Ellingsen* v. *Milk Wagon Drivers' Union* (April 10, 1940), which is being held on rehearing pending this Court's determination of the present issue, but which is reported in full in Commerce Clearing House, 2 Labor Cases, 567, the Supreme Court of Illinois applied the same principle to a case where "it was not contended that there was violence in the sense of personal contact," and said as to the *Meadowmoor* case:

> "In that case there was some evidence of violence, but an examination of the opinion will disclose that the issue of violence was not the turning point of the decision."

With respect to the issue here involved the Court said in the *Ellingsen* case:

> "In the *Meadowmoor* case the question of the right of free speech, which is earnestly urged here, was considered. Relying upon cases of the federal courts, it was held that the constitution does not protect in the use of words which may have all of the effects of force uttered for the purpose of injuring the business of another (*Gompers* v. *Buck's Stove and Range Co.*, 221 U. S. 418, 35 L. Ed. 796), and thus, even though the picketing be peaceful, if, in accordance with a concerted purpose to injure the business of another, words are used which, through fear or disturbance amount to force, such acts are subject to restriction by injunction."

Where prior acts of violence are involved, such acts constitute merely an additional, and not a necessary reason, for enjoining the whole transaction, where there is no proximate employer-employee relation. The Supreme

Court of Illinois has made it clear that peaceful acts may not be enjoined because of prior violence, where there is a proximate employer-employee relation. In *Fenske Bros.* v. *Upholsterers International Union*, 358 Ill. 239 (1934), the Court said, at page 260:

> "The mere facts that acts of violence had been previously committed would of itself furnish no justification for enjoining legal acts of peaceful persuasion. There was therefore no basis for restraining the displaying of the placards and it was error to have done it."

In view of this explicit statement, later limited to an employer-employee relationship (*Meadowmoor Dairies* v. *Drivers Union*, 371 Ill. 377, 392), it is obvious that paragraphs (a), (b), (c) and (d) of the present injunctions are sustainable under the law of Illinois only because of the absence of a proximate employer-employee relation.

Although the Illinois Anti-Injunction Act of 1925 omits the restrictive language of the Clayton Act, the Supreme Court of Illinois has held that it applies only where there is a proximate relation of employer and employee. *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers' Union of Chicago*, 371 Ill. 377 (1939). The construction of a state statute by the highest state court is binding upon this Court; and the state statutory prohibition of injunctions against the matters enjoined in paragraphs (a), (b), (c) and (d) of the present injunctions does not apply to the present case, although it would apply if there were a direct employer-employee relation. But a dispute between an employer and a union of non-employee workers in the same industry is not rendered unlawful because it loses the aid of the state anti-injunction law; and the protection of freedom of assembly and of speech comes from the Fourteenth Amendment and not from the state statute.

Under the law of Illinois, the acts covered by paragraphs (a), (b), (c) and (d) of the injunctions could not be en-

joined merely because unlawful in themselves or because of prior association with acts covered by paragraphs (e), (f), (g) and (h). Their unlawfulness and subjection to restraint arises only when there is an absence of a proximate employer-employee relation. The governmental policy of the state opposes the acts not because of their character nor because of any injury they may occasion, but because they are not committed by employees of the particular employer.

What has just been said applies clearly a different treatment where there is the same peaceful conduct in an employer-employee dispute as contrasted with one not involving employer-employee relations, even though the two involve the same objectives. And the same difference in treatment applies where the same acts of force or violence have in the past been associated with the dispute. Where there is an employer-employee relation, an injunction may issue only against acts of violence. Where no employer-employee relation exists, an injunction may under the view taken by the Supreme Court of Illinois issue against all acts either as peaceful acts alone or as peaceful acts joined with acts of violence.

Does freedom of speech and of assembly under the 14th Amendment apply equally to both, or may such freedom be limited by state action in cases where there is absence of a proximate employer-employee relation? And if such freedom is to be limited, is there to be a variant freedom under the Fourteenth Amendment, dependent upon the policy adopted by each state, or is a single uniform construction to be adopted by this Court?

It will be urged that a decision adverse to the Illinois Court will interfere with the substantive rights protected by state law, and that this should be avoided. The substantive law of the state cannot defeat a right guaranteed by the Fourteenth Amendment, although this Court must

"reconcile two rights in order to prevent either from destroying the other" (*Minersville School District* v. *Gobitis*, 310 U. S. ....., 60 S. Ct. 1010). This Court must settle the question as to whether an employer is entitled to protection from peaceful acts which may injure his business, when such acts are committed by laborers other than his employees, although he is not entitled to such protection against the same acts if committed by his employees or by prior or expectant employees. This issue involves other states than Illinois; but the effect of a decision upon the laws of the several states may be exaggerated.

In the first place, the present case is limited to a dispute between a labor organization and a non-union shop in the same community and engaged in the same industry, and has only in mind the objective stated in the *Tri-City Central Trades Council* case, (257 U. S. 184, 209), that to render their combination effective, "employees must make their combination extend beyond one shop." In this case there is a more specific controversy between labor and employer than if two competing unions were striving for supremacy in a union shop, with the employer in the position of an injured bystander.

Moreover, states which have adopted the definition of "labor dispute" found in the Norris-LaGuardia Act will not be affected. This is the result under *American Furniture Co.* v. *I. B. of T. C. & H. of A.*, 222 Wisc. 338, 268 N. W. 250 (1936); *Denver Local Union* v. *Perry Truck Lines*, 101 Pac. (2d) 436 (Colo., 1940); *Mays Furs and Ready-To-Wear* v. *Bauer*, 282 N. Y. 331; 26 N. E. 2d. 279 (1940). Where there is no such statutory definition, state courts have often held that an employer-employee relationship is not a requisite of a labor dispute, where there is a substantial common concern. Decisions of this character are reviewed in *City of Reno* v. *Second Judicial District Court*, 95 Pac. 2d. 994 (Nev. 1939).

In some other states, the statutes or existing rules of common law or equity will be affected. Wisconsin by statutory amendment of 1939 (Laws, 1939, Ch. 25) defined a labor dispute to mean "any controversy between an employer and a majority of his employees." Recent statutory changes have accomplished similar results in Oregon (Laws, 1939, Ch. 2), and Pennsylvania (Laws, 1939, p. 302); Minnesota accomplishes the same purpose in part by requiring that a majority of picketers be employees of the place of employment being picketed (Minn. Laws, 1939, Ch. 440). A careful analysis of state statutes has been made by Russell A. Smith and William J. DeLancey, *The State Legislatures and Unionism,* 38 Mich. Law Review, 987-1031 (May, 1940). In some other states, as in Illinois, statutes have been so construed as to leave the determination of the issue to the courts. This has been accomplished in Massachusetts, where the Court has held that a broad statutory definition of "labor dispute" does not apply to acts of picketing or persuasion, and that "by our common law the right to strike and to maintain pickets against an employer is deemed the right of his employees only." *Simon* v. *Schwachman,* 18 N. E. 2d. 1 (1938); *Quinton's Market* v. *Patterson,* 21 N. E. 2d. 546 (1939).

A decision by this Court that a proximate employer-employee relationship is not necessary to preserve freedom of speech and of assembly in a labor dispute, will, and should affect the substantive standards of states whose courts hold, either at common law or on the basis of statutes, that such a dispute is unlawful and that therefore all actions in connection therewith are unlawful. This is the basis of the opinion of the Supreme Court of Illinois, now under review and finds support in *Retail Clerks Union* v. *Lerner Shops,* 193 So. 529 (Fla., 1939); *Roth* v. *Local Union No. 1460 of Retail Clerks Union,* 24 N. E. 2d. 280 (Ind., 1939); and *Crosby* v. *Rath,* 136 Ohio St. 352, 25 N.

E. 2d. 934 (1940). From the Ohio decision a petition for certiorari is now pending in this Court.

The provisions of the injunctions here at issue can be sustained only on the ground that all peaceful acts in a labor dispute are unlawful if there is no proximate employer-employee relation. This Court has already expressed its opinion as to this matter.

In dealing with non-employees not under the Clayton Act, this Court said in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 212-213 (1921), that the members of a local union and the union itself "have sufficient interest in the wages paid to the employees of any employer in the community to justify their use of lawful and peaceable persuasion to induce those employees to refuse to accept such reduced wages and to quit their employment." Although the American Federation of Labor and the Chicago Federation of Labor and the members thereof are parties in the present case, they are so because of the membership therein of local unions, and the pleadings show that the injunctions are primarily directed against members of the local unions of barbers and hairdressers because of their actions or anticipated actions with respect to a non-union beauty shop and non-union workers in the same industry and within the same territorial area. The employees in the present case have a closer substantial interest than did the thirty-seven trade unions united in the Tri-City Central Trades Council.

In the *Tri-City Central Trades Council* case, the Court said, at page 209:

> "To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because, in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership, and especially among those whose labor at lower wages will

> injure their whole guild. It is impossible to hold such persuasion and propaganda, without more, to be without excuse and malicious."

The Supreme Court of Illinois has held that such persuasion and propaganda, without more, are without excuse and malicious.

In *Thornhill* v. *Alabama*, 310 U. S. 88, 103, this Court recently quoted with approval the statement of Mr. Justice Brandeis in *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 478:

> "Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

As a basis for this indication of the scope of freedom of speech, Mr. Justice Brandeis stated in the same case that: "Neither Senn or any of his employees was at the time this suit was begun a member of either union, and neither had any contractual relations with them" (page 473); and that "the fact that none of Senn's employees was a union member, or sought the union's aid, is immaterial" (page 481).

The facts of the *Thornhill* case do not show the nature of the dispute, but in that case, this Court not only approved the statement of Mr. Justice Brandeis, in the *Senn* case, but said, at 310 U. S. 102-103:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. • • • It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing."

And in *Carlson* v. *California*, 310 U. S. 106, the Court recognizes not only the rights of union non-employees but also the rights of "disinterested persons (who might be hired to carry signs)."

This Court has clearly recognized that persons other than employees may have an interest in a labor dispute, and may exercise freedom of speech and of assembly in the expression of such interest. Restraint of such freedom is not within the power of a state. If there may be a lawful labor dispute without a proximate employer-employee relation, each side is entitled to tell its story peacefully and without violence.

III.

THE SCHEME OF ACTION BY ORGANIZED LABOR IN THE PRESENT CASE IS NOT UNLAWFUL, AND THOUGH UNLAWFUL ACTS IN SEEKING ITS ACCOMPLISHMENT MAY BE ENJOINED, SEPARABLE LAWFUL ACTS MAY NOT BE RESTRAINED.

The Supreme Court of Illinois takes the view that there is here an unlawful scheme because (1) no proximate relation of employer and employees exists, and that therefore all acts in connection therewith have the effect of force; (2) the activities of the union will be injurious to the employer; and (3) that if acts approaching violence are admitted, even on the basis of demurrer, all acts become unlawful and may be enjoined by a court of equity.

(1) Enough has been said as to the first of these points. Peaceful acts of speech and assembly may not be enjoined because of absence of an employer-employee relation. Force, violence, malice and untruth are not presumed from the absence of such relationship in a labor dispute.

(2) The contention that peaceful activities of the union will be injurious to the employer is also based on the absence of an employer-employee relation. In *Fenske Bros.* v. *Upholsterers International Union*, 358 Ill. 239,

quoted at page 16 of this brief, the Supreme Court of Illinois has made it clear that if there is a proximate employer-employee relation, the employer must endure the injury occasioned by peaceful acts such as are enjoined by paragraphs (a), (b), (c) and (d) of these injunctions; and the alleged unlawful injury in the present case is based upon the statement by the Supreme Court of Illinois that "terms [were] prescribed by others without lawful power to prescribe them." (R. 28.)

It is fully established that the free exercise of speech and of assembly in a labor dispute is not defeated merely by the fact that their exercise may be injurious to the employer. When the *Tri-City Central Trades Council* case, quoted above, was in the United States Circuit Court of Appeals, that Court stated briefly and clearly the rule here applicable. It said:

> "Methods may be considered lawful, even though the employer's business is interfered with, because such methods are incidental to the right of the employee, which right should be and is recognized as equal to the right of the employer." (238 Fed. 729, page 733).

A similar view is reflected in the opinion by this Court in the *Tri-City* case, quoted above.

In *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468 (1937), this Court said:

> "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. * * * It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution. * * * It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he had hoped to get. But a hoped-for job is not property guaranteed by the Constitution." (Pages 478, 482.)

More recently this position has been reaffirmed in *Thornhill* v. *Alabama*, 310 U. S. 88, at page 104:

> "It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that other may thereby be persuaded to take action inconsistent with its interests."

The mere fact of injury to the employer because of the lawful exercise of freedom of speech and of assembly in a labor dispute does not justify a restraint upon such freedom; and this statement applies equally where there is an employer-employee relation and where there is a substantial interest upon the part of non-employees.

(3) The contention that admitted acts of violence make all acts unlawful again presents the issue as to the employer-employee relation, because the Supreme Court of Illinois has made it clear that, had such a relation existed, paragraphs (a), (b), (c) and (d) of the present injunctions would be invalid under the law of that state, even though there had been prior acts of violence. (*Fenske Bros.* v. *Upholsterers International Union*, 358 Ill. 239, quoted at page 16 of this brief.)

No Admissions of Violence or Untruth Support the Permanent Injunction.

Nor does the question of admitted acts of violence present itself as to the permanent injunction. As hereafter indicated, the motion to dismiss (demurrer) admitted facts well pleaded in the complaint. The order of the trial court striking the complaint was "reversed, an-

nulled and set aside" by the Appellate Court (R. 23-24), and this action was affirmed by the Supreme Court of Illinois. (R. 33.) The reversal of the trial court's favorable action on the motion to dismiss disposed of that motion, together with any admissions made thereby, and left further proceedings to be determined on the basis of the complaint and answers. The permanent injunction is explicitly based upon a finding that appellants (Swing, *et al.*) maintained their complaint on the ground that, under the law of Illinois, "peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (*i.e.*, where there is not a proximate relation of employees and employer)." (R. 37.)

The orders of the trial court dissolving the temporary injunction and dismissing the complaint were set aside by the reviewing courts, and the temporary injunction was reinstated on the ground that the motion to dismiss was improperly granted. This constitutes a denial of the motion to dismiss. The motion to dismiss (demurrer) and all admissions thereby disappeared from the picture when such motion was held by the Appellate and Supreme Courts of Illinois to have been improperly granted by the trial court; and the subsequent decree of the Appellate Court granting a permanent injunction was not entered in review of the trial court, but was an exercise of power to enter an original judgment on the showing by complaint and answers that there was no employer-employee relation between the parties. In the exercise of such power, the state Appellate Court was acting under express statutory authority to "give any judgment and make any order which ought to have been given or made." (Civil Practice Act of Illinois, Sec. 92 (1) (f). Ill. Revised Statutes, 1939, Ch. 110, Sec. 215.) Had the case been remanded to the trial Court, that court would have been under a duty to treat the motion to dismiss as denied and to try the case on the merits or to enter a decree if the facts shown

by the complaint and answers justified such action without trial. The court of review has and in this case exercised power to do what the trial court would have been under a duty to do. The power of the State Appellate Court to enter an original judgment upon the complaint and answers is not under dispute in this Court, but is finally decided by the action of the Appellate Court of Illinois, and by the denial of writ of error by the state Supreme Court. *Central Union Telephone Co.* v. *City of Edwardsville,* 269 U. S. 190.

A motion to dismiss, like a demurrer, primarily tests the sufficiency of pleadings. If such a motion is sustained against a complaint or an answer, the party has an opportunity to plead over. If a motion is denied, the party against whom the denial is made may file an answer upon the merits, or, as in this case, may rely upon an answer on the merits which has been filed before he made the motion to dismiss.

Legally, the allegations of the complaint play no part in the granting of the permanent injunction, except as they and the answers show that the defendants were not employees of the plaintiff but that the defendant members of local unions were engaged in the same industry and within the same territorial area. Without proof, the absence of an employer-employee relation appeared on the face of the pleadings, and this was regarded as sufficient basis for the permanent injunction.

The decree of the Appellate Court, which made the injunction permanent, and the refusal of the state Supreme Court to review such decree, are based upon the fact that the pleadings showed the absence of a proximate employer-employee relation, and that such absence without more entitled plaintiffs to a permanent injunction under the law as declared by the Appellate and Supreme Courts. This was the finding stated in the Appellate Court's decree. The plaintiffs being entitled to a decree upon such

showing, it was therefore unnecessary to remand the case to the trial court for the trying of issues of alleged violence raised by the complaint and denied by answer.

Admissions of Violence by Pleadings Under Which the Temporary Injunction Was Sustained Were Insufficient to Sustain the Contested Provisions of That Injunction.

The temporary injunction was based on a motion to dismiss the complaint and inasmuch as said motion admitted the well-pleaded allegations of the complaint, it is proper to discuss such allegations in their relation to the temporary injunction.

However, attention should again be called to the fact that, under the *Fenske Bros.* case, quoted at page 16 of this brief, paragraphs (a), (b), (c) and (d) of the temporary injunction could not be sustained by the Supreme Court of Illinois where there is an employer-employee relation, even though prior violence had been established. The net result under the law of Illinois is that no peaceful acts may be enjoined, whether alone or joined with acts of force or violence, where there is an employer-employee relation; and that all acts may be enjoined, whether altogether peaceful or joined with acts of violence, where there is no employer-employee relation. Independently of the existence or non-existence of violence in the present case, the validity of these paragraphs of the temporary injunction may be determined, independently of the motion to dismiss, on the issue as to whether freedom of speech and of assembly may be forbidden in a labor dispute where there is no proximate employer-employee relation, although it may not be forbidden if there is such a relationship. It is desirable, however, even in view of this fact, to present the issues of violence to the Court.

Under Illinois practice: "A motion to dismiss, like a demurrer, admits such facts as are directly alleged. A

demurrer or motion to dismiss does not admit conclusions drawn by the pleader." *Barzowski* v. *Highland Park State Bank,* 371 Ill. 412 (1939), p. 416. Although sworn answers were filed denying the allegations of the complaint and are a part of the record in this case (R. 16, 18), the subsequent motion to dismiss presented by the defendants relied upon the motion independently of such answers.

The opinion of the Supreme Court of Illinois concedes that one allegation of the complaint (that as to malice in statements on signs) was a conclusion of the pleader. (R. 25), but proceeds on the assumption that all allegations are properly pleaded and are admitted. This Court is not bound by the statement of fact by the state court. Where issues of federal right are involved and detailed facts are admitted by demurrer "this Court must analyse the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the state supreme court in this regard." (*Truax* v. *Corrigan,* 257 U. S. 312, 325.) The facts of the present case also bring it within the statement of this Court that: "This Court will review the findings of fact by a state court (1) where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyse the facts." (*United Gas Public Service Co.* v. *Texas,* 303 U. S. 123, 143.)

The allegation of the complaint perhaps most relied upon in the opinion of the Supreme Court of Illinois is that two pickets carried signs that "This Beauty Shop is Unfair to Organized Labor" and that this statement was "untrue and designedly false and malicious." (R. 10.) The opinion of the Court said that the charge of malice was a conclusion of the pleader, but that it was sufficiently established by

the fact that the employees joined the employer in the suit. (R. 25.) In their brief opposing the petition for writ of certiorari in this case (page 17), respondents charged that the statements were libellous, but would cease to be so if a later employer-employee relation were established, thus indicating that the alleged libel was based upon an opinion as to the relations of the parties to the labor dispute. The allegations of falsity and maliciousness would appear to be conclusions of the pleader, and the admission by motion to dismiss relates only to the carrying and to the content of the signs. If freedom of speech applies to a labor dispute where there is no proximate employer-employee relation, there is nothing false or malicious. In *Carlson* v. *California*, 310 U. S. 106, 112, this Court properly said that: "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern."

In one matter the complaint expressly states a "conclusion" that the hot water apparatus was in good condition (R. 11), and that subsequent defects were occasioned by a conspiracy of defendants. Little weight can be given to conclusions of this character.

If the determination of the issues of this case depended upon proof of violence, there are certain acts admitted by motion to dismiss (demurrer) which may be so termed. It is so admitted that one woman grabbed another by the arm (R. 6); that two men told a woman not to patronize the shop (R. 6); and that pickets gazed and stared at defendant's employees. (R. 11.)

But the acts of violence admitted by the pleadings are not sufficient to support injunctions of the character here at issue, and, as previously indicated, are not admitted as to the permanent injunction. The injunctions have been analysed on pages 7-8 of this brief. They forbid all future peaceful acts and all future statements, irrespective of their truth or falsity. The restraints are not limited to local

unions and their members, but apply to all actions and to all persons, irrespective of time, place or manner. The violence shown by pleadings in the record of the present case is not sufficient to support an injunction against peaceful speech and assembly.

Violence of a much more serious character, established by evidence, existed in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 212-213, but in that case this Court not only separated lawful from unlawful acts, but it held it improper to enjoin future "lawful and peaceable persuasion," and sustained the rights of organized labor to engage in peaceful persuasion and propaganda, without requiring the existence of a proximate employer-employee relation. Similar action is more easily possible with respect to the temporary injunction in the present case than it was in the *Tri-City Central Trades Council* case, and the law of the state of Illinois makes such action necessary where there is a proximate employer-employee relation. *Fenske Bros.* v. *Upholsterers International Union*, 358 Ill. 239, quoted at page 16 of this brief. If such separation is possible in the one case, it is possible in the other, and if it is not required, it enjoins freedom of speech and of assembly in a labor dispute where such relation does not exist.

The position of the Supreme Court of Illinois finds some basis in the statement of Dean Roscoe Pound that:

> "A growing number of decisions allow an injunction where the writing or publication is a part of a wrong which would be enjoined of itself." Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. Law Rev. 640 (1916), page 655.

Dean Pound added: "But this would be wrong on Blackstone's theory and also under the view taken in *Brandreth* v. *Lance*." (8 Paige, 24, N. Y. 1839.) In *Near* v. *State of Minnesota*, 283 U. S. 697, pages 713-714, this Court has approved Blackstone's theory as to previous restraints.

In the effort to sustain the portions of the injunctions

which restrain peaceful action, on the ground that such peaceful acts are joined with acts of violence, and therefore become parts of an unlawful scheme, support may be sought from *Busch Jewelry Co.* v. *United Retail Employees' Union*, 281 N. Y. 150; but in the more recent case of *May's Furs and Ready-To-Wear* v. *Bauer*, 282 N. Y. 331; 26 N. E. 2d. 279, the Court struck from an injunction "all provisions except those restraining violence, breach of the peace and false and misleading statements," saying that the *Busch* case was based on a finding that there was "a situation completely permeated with violence and as affording no ray of hope that the defendant would engage in other than violent picketing." And in *Nann* v. *Raimist*, 255 N. Y. 307, 174 N. E. 690 (1931) all picketing was enjoined because acts of violence had persisted in violation of a prior injunction. In the *Nann* case the court quoted with approval the statement in *Exchange Bakery and Restaurant* v. *Rifkin*, 245 N. Y. 260, 269, that:

> "Where unlawful picketing has been continued, where violence and intimidation have been used, and where misstatements as to the employer's business have been distributed, a broad injunction prohibiting all picketing may be granted."

In the present case we have no such situation, and the injunctions not only forbid picketing but all peaceful actions remote from respondent Swing's place of business. And here acts of violence can be separated from those that are peaceful and lawful. The present injunctions can be sustained only on the ground that any peaceful actions whether at the place of dispute or elsewhere, or whether by members of the local union or others, are so united with unlawful acts of violence as to be inseparable now or at any future time.

The rule in the *Busch* case applies to the character of actions and not to the character or relationship of the parties. It applies to a labor dispute irrespective of the presence or absence of a proximate employer-employee re-

lation. Each is governed by the exception in the *Busch* case, and each is entitled to the same protection as in the *Fenske* case under Illinois law.

In order to sustain the restraint here sought to be imposed upon rights guaranteed by the Fourteenth Amendment, it would be necessary to bring the present case within the language of Mr. Justice Holmes who said that "the most stringent protection of free speech would not protect a man * * * from an injunction against uttering words which have all the effect of force." *Schenck* v. *United States,* 249 U. S. 47 (1919), page 52, quoted with approval in *Near* v. *State of Minnesota,* 283 U. S. 697 (1931), page 716. Similar language is found in *Gompers* v. *Buck's Stove & Range Co.,* 221 U. S. 418 (1911), page 439. The statements by this Court in the *Gompers* and *Schenck* cases were applied to unlawful conspiracies, and the language referred to was an essential part of the conspiracy.

Here we have no unlawful conspiracy or other unlawful purpose, but rather a valid objective within the language of this Court in the *Tri-City Central Trades Council* case: and we have also admittedly valid portions of the present injunctions restraining the use of force as a means of achieving the lawful objective. The petitioners here seek relief only from a general restraint upon all future peaceful utterances. The right of assembly is necessarily incident to the right of speech which is so involved.

The Supreme Court of Illinois takes the view that all acts are unlawful and enjoinable in a labor dispute where there is not an employer-employee relationship. As has heretofore been indicated, the issue of admitted violence is not presented as to the permanent injunction, and the issue as to the temporary injunction may be decided independently of the allegations of violence in the pleadings. But the same result is reached if consideration is to be given to such allegations.

IV.

THE BALANCING OF CONSTITUTIONAL RIGHTS SUSTAINS FREEDOM OF SPEECH AND OF ASSEMBLY IN THE PRESENT CASE.

"It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others. * * *." Mr. Justice Holmes in *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 357. This Court has recently had occasion to apply this principle in *Minersville School District* v. *Gobitis,* 310 U. S. ...., 60 S. Ct. 1010.

Senn v. *Tile Layers Protective Union,* 301 U. S. 468, 482, and *Thornhill* v. *Alabama,* 310 U. S. 88, are quoted at pages 23-24 of this brief to the effect that the mere fact of injury to the employer because of the lawful exercise of freedom of speech and of assembly in a labor dispute does not justify a restraint upon such freedom. The case of *Fenske Bros.* v. *Upholsterers International Union,* 358 Ill. 239, quoted at page 16 of this brief, shows that the same principle is applied in the state of Illinois where there is a proximate relation of employer and employees. The quotation from the *Senn* case at page 21 of this brief clearly indicates that this Court applies the same principle irrespective of whether there is a proximate relation of employer and employees.

In reconciling the respective rights involved in the present case, it is clear that freedom of speech and of assembly does not justify force or violence, and it is equally clear that the absence of a proximate employer-employee relation does not justify a prohibition against the exercise of these constitutional rights. The balancing of rights does not justify the complete destruction of one in the interest of the other.

Petitioners contend that in the present case the objective is lawful, and that the means of its accomplishment through peaceful solicitation are lawful and are improperly enjoined by the first four paragraphs of the injunctions in this case. There is not a conflict between property and individual rights. Here as in other cases the individual rights must be exercised within proper limits, and there is a remedy for the abuse of freedom of speech. But where the purpose is lawful and the means of its accomplishment are lawful, this Court has properly taken the position in the *Senn, Schneider* and *Thornhill* cases that an injury incident to the exercise of individual property rights may not defeat these rights.

That constitutionally protected freedom of speech may result in abuses in other fields than that of labor disputes is recognized by our law of libel and slander and by other laws for the protection of the individual. The possibility of such abuse was recently recognized by this Court in *Schneider* v. *State,* 308 U. S. 147, 164, when it said:

> "Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."

The harmonizing of co-equal constitutional rights, referred to by the Supreme Court of Illinois, is accomplished by a restraint upon force or violence. But where the pur-

pose is lawful, even though its accomplishment may be injurious, it may not be restrained by a previous censorship of freedom of speech, although there may be and is a remedy for the abuse of such freedom.

It is admitted that the balancing of rights protects labor where there is a proximate employee-employer relation; and this Court has properly said in the *Tri-City* and *Senn* cases that the same protection applies to "employees" who "must make their combination extend beyond one shop" in the same trade and the same community.

V.

THE FOURTEENTH AMENDMENT PROTECTS FREEDOM OF SPEECH AND ASSEMBLY FROM STATE JUDICIAL IMPAIRMENT AS FULLY AND COMPLETELY AS FROM IMPAIRMENT BY OTHER DEPARTMENTS OF THE STATE GOVERNMENT.

The Supreme Court of Illinois has construed the anti-injunction act of that state to apply only to labor disputes in which there is a proximate relation of employer and employees. The prohibitions of that act therefore forbid provisions like paragraphs (a), (b), (c) and (d) of the injunctions only where there is such a relation; and it is for the Supreme Court of that state to determine in first instance what rules of law shall apply where no such relation exists. These provisions of the injunctions are therefore purely judicial actions. It may therefore be urged that even though such provisions would be invalid in a state statute or in municipal ordinances, the judicial action is not subject to the Fourteenth Amendment.

The municipality is an agent of the state and its action is state action. The court is an instrumentality of the state, and its action is state action. The Fourteenth Amendment forbids any state to deprive of life, liberty or property without due process of law. The Court must look to the result and not to the instrumentality of the

state which accomplishes the result. "Whoever, by virtue of a public position under a state government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name of and for the state, and is clothed with the state's power, his act is that of the state. This must be so or the Constitutional provision has no meaning." *Ex parte Virginia,* 100 U. S. 339 (1880).

The due process clause of the Fourteenth Amendment has been systematically construed to apply to all state action, whether legislative, executive or judicial. This Court has carefully protected individual rights against impairment by state judicial action. *Tumey* v. *State of Ohio,* 273 U. S. 510; *Brown* v. *State of Mississippi,* 297 U. S. 278; *Chambers* v. *State of Florida,* 309 U. S. 227.

It may, however, be argued that, in protection of freedom of speech and assembly, the Fourteenth Amendment goes no farther than the First Amendment, and that the First Amendment protects only against restraint by Congress and not by other departments of government. It is true that the First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech or of the press; or the right of the people peaceably to assemble." But by the Fifth and Fourteenth Amendments these rights are guaranteed against impairment by any department of either national or state government. The due process clause of the Fourteenth Amendment applies to any state action; and it seems clear that this Court would have reached the same result in *Near* v. *State of Minnesota,* 283 U. S. 697, had there been no state statute and had the state court sought to impose the same "previous restraint" upon the basis of a claimed equity jurisdiction.

But it may be urged that the determination of labor

controversies and of the legality of actions in connection therewith is properly a matter of state regulation and that this Court should therefore follow restrictive decisions of state courts, even though such decisions may curtail freedom of speech and of assembly as recognized by this Court under the Fourteenth Amendment. If this Court were bound by the determinations of state courts as to what constitutes due process of law under the Fourteenth Amendment, review of such determinations by this Court would be useless.

Briefly summarized, the argument here is that a state court may, by calling an act unlawful, be permitted to withdraw it from the protection of the Fourteenth Amendment.

It may be urged that this position is supported by *Minersville School District* v. *Gobitis*, 310 U. S. ....., 60 S. Ct. 1010, where state policy was held controlling as to "the wisdom of training children in patriotic impulses" in the public schools of the states; but a similar policy is not here involved, and that the principle of the *Gobitis* case is not applicable here is made clear by the language of the *Thornhill* case, decided by this Court less than two months prior to the *Gobitis* case.

Support may also be sought from the statement by Mr. Justice Holmes in *Patterson* v. *Colorado*, 205 U. S. 454, 461: "What constitutes contempt, as well as the time during which it may be committed, is a matter of local law." The *Patterson* case involved punishment for contempt in the publication of criticisms of a state court with respect to actions still pending. This Court stated that the facts were sufficient to show that contempt existed and said that "We leave undecided the question as to whether there is to be found in the 14th Amendment a prohibition similar to that in the 1st." The facts of the case clearly distinguish it from that now before the Court. It was de-

cided in 1907, and although frequently cited since that date, such citations do not support the doubt as to the scope of the Fourteenth Amendment nor a position that local law is to determine the extent to which freedom of speech and of assembly may be curbed by state judicial action.

At the expense of some duplication, it may be well to indicate briefly the effect in the present case if state law is controlling as to freedom of speech and of assembly under the Fourteenth Amendment: (1) The Supreme Court of Illinois takes the view that any effort of non-employee union members to disseminate information that an employer is non-union is unlawful, and that any peaceful solicitation is therefore part of an unlawful scheme and an unlawful interference with property rights. This Court takes a different view in the *Tri-City* and *Senn* cases. (2) The Illinois Supreme Court takes the view that non-employee solicitation which may interfere with or injure the employer's business is unlawful, and is in no way protected by the Fourteenth Amendment. A different view has been taken in the *Tri-City, Senn* and *Thornhill* cases. (3) The Illinois court takes the position that the existence of any elements of violence in the past authorizes the complete prohibition of any peaceful acts of solicitation in the future. This Court has taken a different view in the *Tri-City* case, holding it improper under such circumstances to enjoin future "lawful and peaceful persuasion." (257 U. S. 184, pp. 212-213.) All of these issues are fundamental to freedom of speech and of assembly under the Fourteenth Amendment.

Under the view taken by the Supreme Court of Illinois, the injunction provisions here in issue are sustained; under the view taken by this Court, they would be violative of the Fourteenth Amendment. Which is to govern? Is each

state to determine the limits of freedom of speech and of assembly?

If this Court should regard it as its duty to follow the state courts, each state court may set its own standards as to what conduct is unlawful and beyond the protection of the federal constitutional guarantee of freedom of speech and of assembly, and this Court would be bound by such standards. This would mean that in the present case this Court would abandon its views, and accept the Illinois Court's views, as to the unlawfulness of (1) peaceful solicitation by non-employees in a labor controversy; (2) injury to the employer's business incident to such peaceful solicitation; and (3) future peaceful persuasion where there has in the past been an element of force or violence. These are unlawful under the state judicial standard in Illinois, and are lawful under the standards set by this Court. The state court finally determines what is the law of the state, but it cannot decide finally whether the law so determined infringes rights guaranteed by the Constitution of the United States, nor can it establish controlling standards for the determination of the scope of such rights. Without a power of final determination of these rights by this Court, and without the exercise of that power as a matter of duty, "the Constitution of the United States would be different in different states, and, might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states." *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 348.

With respect to degree of restraint, paragraphs (a) and (b) of the present injunctions present substantially the same issues as those involved in the *Thornhill* and *Carlson* cases; but paragraphs (c) and (d) of the injunctions (R. 14, 38) impose restrictions upon speech and assembly much broader than in those cases. The terms of the injunctions are more restrictive than those of the statute and ordinances that have been held invalid.

With respect to the question whether the Fourteenth Amendment applies to judicial action, attention should be called to the fact that judicial restraint is much more effective than legislative restraint. It is true that a separate injunction is required in each case; but the Supreme Court of Illinois has in the present case prescribed the pattern of such an injunction, and has made it the duty of trial courts to issue such an injunction upon a showing of absence of an employer-employee relationship. That this is the position of the Supreme Court of Illinois is made certain by the explanatory statement of that court in the recent *Ellingsen* case, quoted at page 15 of this brief.

The restraint by injunction is under this view a matter of right, and the inferior courts have no discretion. The Appellate Courts of Illinois have necessarily applied the law as established by the state Supreme Court. *Hendrickson Motor Truck Co.* v. *International Association of Machinists,* 301 Ill. App. 608; *Jaffe* v. *Auto Mechanics Local,* 301 Ill. App. 624. And if state law governs, the principles of this case and of the *Meadowmoor* case, as explained in the *Ellingsen* case, will be controlling in the federal courts if the present decision stands. *Lake Valley Farm Products* v. *Milk Wagon Drivers' Union,* 108 Fed. (2d) 436, 443, which is now under advisement in this Court on review.

Since the original opinion of the Supreme Court of Illinois in the present case (June 19, 1939), injunctions substantially identical with that here involved have been obtained in practically every labor controversy in Illinois where the proximate relation of employer and employee was absent; and a conservative estimate of the number of such injunctions would indicate at least one hundred in the state as a whole, and at least fifty of this number in Cook County.

With reference to restraint by injunction, it should also be indicated that violations are punishable by summary proceedings for contempt, and that more effective enforcement is thus possible, without the necessity of according the accused the ordinary safeguards of the judicial process.

Conclusion.

Again calling attention to the fact that petitioners limit their attack to provisions of injunctions which restrain peaceful persuasion, it should be stated that there is no desire to protect violence, but rather to discourage violence or force. The suppression of free speech does not suppress, but encourages, violence.

Respectfully submitted,

WALTER F. DODD,
DANIEL D. CARMEL,
Attorneys for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 56

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONERS.

WALTER F. DODD,
DANIEL D. CARMELL,
Counsel for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO 56

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Respondents.

REPLY BRIEF FOR PETITIONERS.

Confusion as to the issues of this case is occasioned by Respondents' effort to magnify the element of force and to minimize the scope of the injunctions here involved.

The Issues.

It therefore becomes necessary to restate the issues:

1. With respect to the temporary injunction, did the absence of an employer-employee relation between the parties, together with the admission (by motion to dismiss) of such alleged acts of violence as were properly set up in the complaint, sustain restraint upon a peaceful exercise of freedom of speech and assembly in a labor dispute?

2. With respect to the permanent injunction, does the absence of an employer-employee relation alone and in

and of itself sustain restraint upon a peaceful exercise of freedom of speech and of assembly in a labor dispute?

The restraining clauses here at issue relate only to peaceful action.

The issue is that as to whether all action by non-employees is in itself unlawful because of an alleged unlawful objective of seeking to influence employees to become members of a union, or to influence employers to employ only union employees. This is the basic question argued by Respondents. (Respondents' Brief, 3, 12, 13, 25, 32, 49, 52, 55.) It is in precise accord with a statement subsequently made by the Supreme Court of Illinois, and quoted at page 15 of Petitioners' original brief, but carefully avoided by Respondents. In the case of *Ellingsen* v. *Milk Wagon Drivers Union*, 2 Labor Cases, 567 (1940), the Supreme Court of Illinois, in explaining its position, stated that, in a case of non-employee activities peaceful acts had the effect of force and were unlawful because of an unlawful objective.

Respondents realize that they can sustain a case only on the basis of physical force and violence. The Supreme Court of Illinois has explicitly stated in the *Ellingsen* case that its opinion, which dealt only with the temporary injunction, was not based on the element of physical force and violence; and, had this statement not been made, the well-pleaded allegations of the complaint, which were admitted by motion to dismiss, were insufficient to sustain an injunction against future peaceful actions. And the element of physical force and violence is entirely absent from the proceedings resulting in a decree of permanent injunction.

It is established law in Illinois that, if an employer-employee relation exists, the peaceful acts here involved cannot be enjoined, irrespective of whether they were associated with prior acts of violence or were entirely

free from such association. *Fenske Bros.* v. *Upholsterers International Union*, 358 Ill. 239, quoted at page 16 of Petitioners' original brief, Agreement with this statement will be found in Respondents' Brief (page 55).

Although Respondents argue that the objective is unlawful and that all acts in furtherance thereof are also unlawful, they at the same time seek to narrow the scope of clause (d) of the injunctions, and admit that non-employee activities are lawful "anywhere other than in front of the place of business." (Respondents' Brief, 16.) If such acts are lawful elsewhere, they are lawful in streets and public places. *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147.

The Temporary Injunction.

The decisions of the Appellate and Supreme Courts of Illinois sustaining the temporary injunction in the present case were based upon the ground that the trial court improperly granted a motion to dismiss the complaint. For the purpose of testing the sufficiency of the complaint, the motion to dismiss admitted allegations that were well-pleaded in the complaint. The rules governing this Court and the Supreme Court of Illinois in this matter are discussed at pages 27-32 of Petitioners' original brief.

Respondents now contend that Petitioners cannot assert that any of the statements of the complaint are conclusions of the pleader (Respondents' Brief, 10). This view is based on the theory that the Appellate Court in entering a permanent injunction must of necessity have adopted the allegations of the complaint, or that it would not otherwise have enjoined acts of violence, and that such allegations thus became findings of fact by the court (Respondents' Brief, 8, 15, 65). The restraining clauses of the permanent injunction are the same as those of the

temporary injunction issued before answers to the complaint were filed (R. 14, 38), and it could hardly be true that the trial court found facts before there was an opportunity of the parties to answer. There are no findings of fact in either injunction except the one as to the absence of an employer-employee relation in the permanent injunction; and Respondents, while claiming that their complaint impliedly constitutes a finding of fact in the Appellate Court, appear to allege that it was improper for the Appellate Court to make a finding as to the absence of an employer-employee relation which appeared undenied on the face of both complaint and answers. (Respondents' Brief, 6.)

Moreover, there may be some question as to the correctness of Respondents' theory that a labor injunction never restrains acts other than those of a type already committed, and that such injunctions "never operate prospectively" (Respondents' Brief, 55).

This Court has full authority to determine the weight to be given to allegations in the complaint, and also to determine whether such allegations would support restraints in the temporary injunction upon peaceful acts which could not be enjoined under the law of Illinois had there been an employer-employee relation.

Conclusions of the pleader are too common in applications for injunctions in labor disputes; and Mr. Chief Judge Cardozo properly said in *Nann* v. *Raimist*, 255 N. Y. 307, 318, that:

> "Courts have enough to do in restraining physical disorder without busying themselves with logomachies in which the embattled words are the expression of the opinion of the writer or the speaker."

The Permanent Injunction.

No issue of violence is involved as to the permanent injunction, but only the issue as to whether peaceful acts in a labor dispute may properly be restrained where there is no proximate relation of employer and employee between the parties. However, if the issue of violence were involved here, it would not justify the restraint sought to be imposed.

So long as the motion to dismiss was undisposed of, properly pleaded allegations in the complaint were admitted, and the previously filed sworn answers of Petitioners (defendants below) were not before the Court for consideration. The motion to dismiss having been disposed of by opinion of the Supreme Court of Illinois, it was proper for the Appellate Court to proceed therefrom on the complaint and answers, unless the parties desired to file other pleadings. It would appear unnecessary to develop further this elementary principle of procedure, in view of the fact that Respondents say that: "At the time of the entry of the decree there was before the Appellate Court all pleadings, including the defendants' answers." (Respondents Brief, 6. This statement also appears on page 4.) In view of this necessary admission by Respondents, no weight can be attached to their frequent statements that, with respect to the permanent injunction, all allegations of the complaint shall be taken as true and that all statements in the sworn answers shall be disregarded. (Respondents' Brief, 8, 9, 51, 65, 67.) Respondents' theory appears to be that the sworn answers were reinstated by the disposal of the motion to dismiss, but that such answers are of no effect and that all allegations of the complaint are still admitted. (Respondents' Brief, 8, 10, 24.) On this theory Respondents' Brief (pages 10-11) presents a resumé of the pleadings which is limited to the complaint.

The Illinois practice is sufficiently indicated in *Ritholz* v. *Andert*, 303 Ill. App. 61, 70 (1940):

> "Plaintiffs suggest, rather than argue, that as defendants failed to introduce any evidence to disprove the verified allegations in the second amended bill as to threats, intimidation, etc., these allegations should be taken as proof that the picketing was not peaceful. It is sufficient answer to the suggestion to say that the said allegations were denied in the verified answers filed by defendants. Plaintiffs made the charges of violence and intimidation and the burden was upon them to prove the charges."

The permanent injunction was entered by the Appellate Court on the basis of a complaint and sworn answers then before it, and it clearly appeared as undisputed from the face of such pleadings that there was no proximate relation of employer and employee between the parties (R. 4, 18-23). In entering its permanent injunction, the Court recited in its decree:

> "(3) That this Court and the Supreme Court of this State have held in this case, that, under the law of this state, peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (*i. e.*, where there is not a proximate relation of employees and employer), and that appellants are entitled in this case to relief by injunction against the threat of such peaceful picketing or persuasion by appellees; and,
>
> "(4) That appellants have therefore maintained their complaint, and the equities of the case are with the appellants." (R. 37.)

Respondents contend that these findings are not to be considered by this Court because (1) under present Illinois practice special findings of fact are not necessary to support a decree; (2) no evidence was presented by Petitioners in support of such finding, and (3) a new issue was introduced into the case by such finding (Respondents' Brief, 6-8, 65).

Illinois practice does make it unnecessary that a decree recite all facts or that a person seeking to support the

decree bear the burden of preserving the record in support of such facts, but this does not mean that the courts of equity are not to make findings of fact, nor does it detract from the weight to be given to such findings of fact.

It hardly seems necessary to comment upon the second objection. No record other than the pleadings needed to be preserved as a basis for the finding, and to require evidence as to a matter alleged by complaint and admitted by answer would be ridiculous. Respondents admit that the pleadings were sufficient for a trial and decree on the merits, but contend apparently that the finding upon which the decree is based must be supported by evidence introduced by defendants (Petitioners here), although the facts found are already alleged in the complaint and are admitted in sworn answers by such defendants. Respondents also say that the burden is on Petitioners (defendants below) to support an attack on the final decree (Respondents' Brief, 6), but they forget that they are attacking the finding of a decree which is in their favor. The Appellate Court had power to enter a decree, without evidence, on findings based upon undisputed facts in the complaint and answers which, under decisions by the Appellate and Supreme Courts of Illinois in the present case entitled Respondents to such decree, and Petitioners had no right to object to the exercise of such power.

The third objection to the finding by the Appellate Court is that it introduces a new issue into the case, and that Petitioners, by their application to the Supreme Court of Illinois for writ of error, admitted that the permanent injunction involved the same issues as did the temporary injunction (Respondents' Brief, 7-8, 65). Petitioners fully admit and repeat that the same issues were involved. The issue is that as to the power of restraint where there is no employer-employee relation; it was so stated in the original opinion of the Appellate Court; this statement

was quoted with approval by the Supreme Court of Illinois (R. 26); it is repeated in the Appellate Court's decree in the present case, quoted above (R. 37); it is fully conceded on pages 3-4 of Respondents' Brief; and it has been made the basis of an explanatory statement in a subsequent opinion of the Supreme Court of Illinois. (*Ellingsen* v. *Milk Wagon Drivers Union*, 2 Labor Cases, 567, quoted in Petitioners' original brief, 15.)

The issue on the permanent injunction was determined on the basis of complaint and sworn answers—that under the temporary injunction, on the basis of a then undisposed of motion which admitted certain allegations.

The finding by the Appellate Court is the basis for the permanent injunction and is a part of the final decree in the present case. Refusal of writ of error by the Supreme Court of Illinois affirms this decree.

The decree of the Appellate Court, which made the injunction permanent, and the refusal of the state Supreme Court to review such decree, are based upon the fact that the pleadings showed the absence of a proximate employer-employee relation, and that such absence without more entitled plaintiffs to a permanent injunction under the law as declared by the Appellate and Supreme Courts. This was the finding stated in the Appellate Court's decree. The plaintiffs being entitled to a decree upon such showing, it was therefore unnecessary to remand the case to the trial court for the trying of issues of alleged violence raised by the complaint and denied by answer.

Scope of the Injunctions.

In their original brief (pp. 7-8) Petitioners indicated the scope of restraint imposed by the identical provisions of the temporary and permanent injunctions in the present case. Respondents construe the restraints more narrowly.

(Respondents' Brief, 15, 16, 54.) This difference particularly involves clause (d) which enjoins

> "Soliciting, inducing or influencing or attempting to induce or influence persons, employees or prospective employees of plaintiff not to enter his place of business or do business with him." (R. 14, 38.)

This clause is supplemented by clause (h) which enjoins "advising, encouraging or assisting or participating in the doing of any of the things herein forbidden," and its scope is defined in the permanent injunction so as to apply to all defendants "individually and in their official capacity, and all other persons as agents, representatives, members, attorneys of the defendants and all persons acting in concert with said trade union defendants and individual defendants." (R. 38.)

Respondents take the position that this clause applies only to acts "in front of the place of business"; "threats of intimidation," and to "restraints on speaking or publishing falsehoods and untruths." (Respondents' Brief, 16, 54.) But under the view taken by the Illinois courts, allegations of unfairness would be false and untrue because of the absence of an employer-employee relationship. (Respondents' Brief, 55.) It is for the Court to determine the scope of restraint imposed by these injunctions.

Attention should, however, again be called to the fact that Respondents, in their effort to restrict the scope of the present injunctions, appear to admit the rights of non-employees "anywhere other than in front of the place of business" (Respondents' Brief, 16); and thus concede that solicitation by such non-employees does not have an altogether unlawful objective. This admission brings the present case within the decisions of this Court in the *Hague* and *Schneider* cases.

The *Hague* and *Schneider* cases clearly establish the principle that this Court will protect the substance as well as the form of the rights of freedom of speech, of the

press, and of assembly. It is not enough to say, as do the Respondents in their brief, page 16, that you may speak freely, but not in those places where speech is most naturally exercised and where it will be of the most value in transmitting the communications; that you may assemble, but not in the usual place for assembly; that you may circulate printed matter, but not at places where people usually pass and congregate. The constitutional guarantees apply to the actual exercise of these rights. In labor cases it is not enough to say that labor may communicate information and opinion to the public, but not by picketing, or if picketing is going to be permitted, then only away from the area of the employer's place of business, as the Respondents now attempt to interpet the Illinois Court's injunction. Picketing is the usual and only practical method available to labor for the exercise of these constitutional rights. The Respondents suggest a strange constitutional doctrine that while freedom of speech and of assembly may be exercised, it is no longer freedom of speech and of assembly if exercised by picketing peacefully and in the area of an employer's place of business.

Respondents' Argument.

Aside from the matters heretofore dealt with in this reply, Respondents' answer is primarily an able presentation of an economic point of view, and to this no reply will be attempted.

The only argument relevant to the case is that based upon the absence of an employer-employee relation (except as to certain admissions with respect to the temporary injunction); and this is the basic point in Respondents' Brief, although it is to a large extent concealed by frequently-repeated erroneous statements regarding rules of judicial practice and the degree of admitted allegations

through motion to dismiss the complaint, under that practice.

For example, the Respondents' argument begins (pages 23-25) with an assumed correctness of all allegations in the complaint and proceeds upon that assumption throughout (pages 32, 43, 51-52, 53, 66) although, as has been pointed out, none of such allegations are applicable to the decree of permanent injunction which is based on a finding of one specific and sufficient fact recited in the decree.

And the basic allegation of untruth in the complaint is a conclusion of the pleader, with respect to the pleadings on which the temporary injunction was based (Petitioners' original brief, 28, 29). In fact, Respondents admit (page 55) that the only element of untruth subject to restraint by injunction is based upon the absence of an employer-employee relation. This is also recognized by the Supreme Court of Illinois which, as indicated by Respondent (page 66), said that the very fact that the employer and his employees joined in the present suit established that allegations of unfairness to organized labor were untrue and malicious. (R. 25.)

The courts have had occasion to pass directly on this issue, and have held that the words "Unfair to Organized Labor" merely indicate that there is a dispute between organized labor and the employer, and contain nothing libelous. *Denver Local Union* v. *Perry Truck Lines*, 101 Pac. (2d) 436 (Colo. 1940); *Parkinson* v. *Building Trades Council*, 154 Cal. 581 (1908); *Cinderella* v. *Sign Writers Local Union*, 6 Fed. Supp. 164, 171 (1934).

Attention should again be called to the fact that Respondents' effort to minimize the scope of the present injunctions in fact recognizes that non-employees have a lawful objective in seeking to unionize non-union shops. If this objective may, as they admit, be lawfully pursued

"anywhere other than in front of the place of business" (Respondents' Brief, 16), the objective itself is not unlawful, and may under the decisions of this Court be lawfully pursued in streets and other public places. *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147.

State Policy and the Fourteenth Amendment.

In Petitioners' original brief (pages 18, 19) reference was made to the effect upon state law of an adherence by this Court to its already expressed view that freedom of speech and of assembly in a labor dispute apply equally to the cases where there is or is not a proximate relation of employer and employees. It will not be necessary to repeat the prior statements of this Court, which are quoted at pages 20-22 of Petitioners' original brief.

The present case involves judicial restraint, and it is unnecessary to repeat what has already been said as to the applicability of the Fourteenth Amendment to judicial action. The validity of no state statute is involved in the present case, and both Petitioners and this Court must accept the interpretation placed upon the Illinois Anti-Injunction Act of 1925, although it may be appropriate to remark that this Act omitted the restrictive language of the Clayton Act. A contrary statement is made by Respondents (Brief, pp. 26-28).

But a decision in this case will involve the validity of statutes in some states and the validity of common law rules now applicable in others. The summary in Petitioners' original brief (pages 18-19) did not seek to make a complete analysis of state law, and the importance of the issue here presented is indicated by the fact that some statements true at the time of filing the original brief are not now accurate. The briefs of both Petitioners (page 19) and Respondents (page 35) refer to an Oregon statute of

939. By opinion of October 22, 1940, in *American Federa-ion of Labor* v. *Bain,* the Supreme Court of Oregon, pro-eeding under the state declaratory judgment act, held the)regon statute invalid. The opinion is largely based on he issue, not relevant here, that the limitation of a labor ispute to a majority of the employees defeated the rights f a minority, but the Oregon Court in broad language de-ied "that a man may be deprived of a fundamental consti-utional right because other men in the past have abused he right * * *." A view contrary to that of the Ore-on Court is expressed by the Supreme Court of Wisconsin n the case of *Hotel & Restaurant Employees' Interna-ional Alliance* v. *Wisconsin Employment Relations Board,* lecided November 8, 1940.

The issue of the present case was more directly involved n *McKay* v. *Retail Automobile Salesmen's Local Union,* lecided by the Supreme Court of California on October 14, 940, together with several other cases upon the same sub-ect. In the *McKay* case the Supreme Court of California aid that "the members of a labor union are privileged to ring such lawful pressure to bear, as is within their con-rol, in order to induce non-union employees to join their nion," and that:

> "Of course the employer and its salesmen argue that the appellants have no right to interfere with relations which are entirely satisfactory to them. This position ignores the broader rights of labor in seeking to advance the interests of the worker by more thorough and complete organization."

There are, of course, other states which, by statute or by udicial decision, adopt the view of the Illinois courts; and *'ornili* v. *Auto Mechanics' Union Local,* 200 Wash. 283 1939), shows that such a view may be adopted even in the ace of a state statute couched in the language of the Nor-is-LaGuardia Act, although a contrary view may be re-ected in *City of Yakima* v. *Gorman,* 200 Wash. 564.

Picketing or solicitation by non-employees is also held improper in *Hotel, Restaurant and Soda Fountain Employees' Local Union* v. *Miller*, 272 Ky. 466 (1938); and it is probable that a different rule is not established by more recent legislation in Kentucky. (Ky. Acts, 1940, Ch. 105, Art. III, Secs. 1, 2.) A similar view is taken in *Keith Theater* v. *Vachon*, 134 Me. 392 (1936). A number of cases in New Jersey take the same position, which is apparently approved by the Court of Errors and Appeals of that state in *Miller's Inc.* v. *Journeyman Tailors' Union*, decided October 10, 1940. *Lyle* v. *Meat Cutters & Butchers*, 174 Tenn. 222 (1938), may perhaps also be grouped with these cases, although it may be distinguished on the ground that no labor dispute was involved because the owner alone operated his business without employees.

But the rights of non-employees to freedom of speech and of assembly have been definitely recognized by numerous other state courts and state legislatures; have been recognized by this Court in the *Tri-City Central Trades Council* and *Senn* cases; and the recognition of such rights is implicit in the *Schneider, Thornhill* and *Carlson* cases.

Petitioners' original brief (last paragraph of page 18) cites recent state decisions sustaining the rights of non-employees; and the decisions there cited analyse the concurring view in other states. The scope of freedom of speech and of assembly by non-employees in a labor dispute now varies from state to state; and in individual states similar chaos exists. This chaos is well illustrated by the two apparently conflicting decisions in the State of Washington, referred to above. There is no uniformity of protection from state to state, and there is none within the same state, although the rights are ones protected by the Constitution of the United States.

The scope of freedom of speech and of assembly guaranteed by the Fourteenth Amendment must be determined

by this Court, and the protection to be accorded by that amendment must be uniform, even though this may adversely affect the standards in some states.

The Respondents quote a statement by Mr. Justice Holmes that the states should be left free to make social experiments, but neither he nor any other member of this Court intended that states should be free to experiment with freedom of speech and of assembly under the Fourteenth Amendment.

Respectfully submitted,

WALTER F. DODD,
DANIEL D. CARMELL,
Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted] 56

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

Motion for Leave to Use as Part of Record in Present Case the Record Filed in American Federation of Labor, John Fitzpatrick, Chicago Federation of Labor, et al. vs. Ross W. Swing, Irene Boivin, Nan Chapman, et al., Docket Number 615.

WALTER F. DODD,
DANIEL D. CARMELL,
Attorneys for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 816 WEST JACKSON, CHICAGO [redacted] 56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. .....

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

Motion for Leave to Use as Part of Record in Present Case the Record Filed in American Federation of Labor, John Fitzpatrick, Chicago Federation of Labor, et al. vs. Ross W. Swing, Irene Boivin, Nan Chapman, et al., Docket Number 615.

MAY IT PLEASE THE COURT:

Now come the American Federation of Labor, John Fitzpatrick, Chicago Federation of Labor, *et al.* and respectfully move that this Honorable Court grant leave to consolidate the record herein filed with the certified record previously filed and now in the Office of the Clerk of this Court in the case of *American Federation of Labor, John Fitzpatrick, Chicago Federation of Labor, et al.* v. *Ross*

W. Swing, Irene Boivin, Nan Chapman, et al., Docket Number 615, so that the two records may be joined and may furnish a complete and single record upon which the Court may proceed in the present case. This motion should be granted for the following reasons:

(1) The parties and issues involved in the two records are the same, and the record filed in this case supplements that previously filed, by including subsequent actions by the Appellate and Supreme Courts of Illinois in the same case, in which writ of certiorari was previously denied by this Court for want of a final judgment.

(2) The consolidation of the two records presents a complete record in the present case, based upon certified records already on file with the Clerk of this Court.

(3) This motion is accompanied by a stipulation of all the parties that such a consolidation of records may be made.

Respectfully submitted,

WALTER F. DODD,
DANIEL D. CARMELL,
Counsel for Petitioners.

April 18, 1940.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 56

AMERICAN FEDERATION OF LABOR,
JOHN FITZPATRICK,
CHICAGO FEDERATION OF LABOR, ET. AL.,
Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN,
NAN CHAPMAN, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

MYER N. ROSENGARD,
SAMUEL A. RINELLA,
Counsel for Respondents.

EUGENE W. SCHOFLER,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 929

AMERICAN FEDERATION OF LABOR,
JOHN FITZPATRICK,
CHICAGO FEDERATION OF LABOR, ET. AL.,
Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN,
NAN CHAPMAN, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

JURISDICTION.

Petitioners invoke the jurisdiction of this Court under Section 237 (b) of the Judicial Code (U. S. Code, Title 28, Section 344). The last order was entered in the Supreme Court of Illinois on April 3, 1940 (sustaining defendants in error (respondents) motion to dismiss the writ of error.

Respondents moved to dismiss the writ of error because it was asserted that all of the questions involved were disposed of and determined on a previous appeal in the same case and between the same parties (Rec. p. 34). The opinion of the Supreme Court of Illinois on the first appeal is officially reported in 372 Ill. 91.

Questions Presented.

We shall hereinafter refer to the parties as follows: To petitioners as "Defendants"; to the respondents as "Plaintiffs." Italics are supplied unless otherwise noted.

The defendants by their petition seek a modification of a final decree enjoining and restraining them from picketing and patrolling in front of or near plaintiffs' place of business and from carrying and exhibiting placards, banners and signs containing legends which the complaint charged and the decree declared were untrue statements of fact; and from inducing or influencing persons not to enter employer plaintiffs' place of business, either to seek employment or to conduct business relationships with him (Rec. p. 37). This decree also enjoins and restrains so-called violent and intimidating conduct of the defendants. Such conduct appears to have taken place and it is so charged in the complaint; the defendants are also charged with fostering, aiding and abetting a secondary boycott (Rec. p. 37). Defendants do not seek a reversal of that part of the injunctional order enjoining and restraining violence and intimidation. Defendants contend in their petition for writ of certiorari that the injunctional order insofar as it restrains picketing, patrolling and the exhibition of signs, placards, etc., in the picket line, even though such signs may contain presently false legends, is a denial of freedom of speech as guaranteed by the Fourteenth Amend-

ment to the Constitution of the United States. Defendants challenge the decree, contending that the restraint of so-called peaceful activities deprived the individual defendants of privileges and immunities guaranteed to citizens of the United States; and also that they were denied due process of law, in that the liberty of freedom of speech was denied to them by that part of the decree herein referred to.

We submit that they are not entitled to review under the privileges and immunities section of the Fourteenth Amendment. This record does not contain any evidence, nor can any reasonable inference be drawn from the record, that the individual defendants are citizens of the United States. Neither the plaintiffs' complaint nor the answers filed by the defendants disclose that the individual defendants are citizens of the United States; (*Hague* v. *C.I.O.*, 307 U. S. 518-523); nor is the asserted liberty a privilege or immunity of citizens of the United States. (*Hague* v. *C. I. O.*, 307 U. S. 518, and other cases cited.) No legislation of the State of Illinois is attacked. While the Supreme Court of Illinois (the court of last resort) was called upon and did construe the Anti-Injunction Act of the State of Illinois, dealing and treating with labor disputes, yet it was not contended in the state courts, nor is it asserted here, that the construction placed upon the act renders this legislation unconstitutional. Defendants concede that they are not attacking the act, and further admit that the construction placed upon the act by the court of last resort of Illinois is binding upon this court. (Petition for Writ of Certiorari p. 23.)

The trade union defendants and their officials did not contend in the state court, nor do they contend here, that they were the duly appointed agents, representatives and bargaining agency of the employee plaintiffs. The com-

plaint here was filed by the employer and all of his sixteen employees; and it was stated and charged that the employees refused to join or recognize the trade unions as their bargaining agency. The strike here and the ultimate purpose for which the strike was carried on was to compel unionization of the shop. Therefore, the ultimate objective did not concern itself with wages, hours or working conditions, or even representation of present employees but merely plant unionization.

The final decree (Rec. p. 37) recites: "The appellants (plaintiffs) have maintained their complaint and the equities of the case are with the appellants." No findings of fact are necessary to sustain the decree Civil Practice Act of Illinois. (Sec. 118, Chap. 110, Ill. Rev. Stat. 1939.) It is presumed that the allegations of fact appearing in the complaint have been proven. The complaint in substance presented the following situation:

(1) The complaint was filed by an employer and all of his sixteen employees (all of whom are women). The employer was engaged in the operation of a beauty shop in the City of Chicago; there was no controversy or dispute between the employer and his employees with reference to hours, wages, terms or conditions of employment or any other controversy of any kind; none of these employees belonged to a trade union, and it is stated that the employees employed by all other beauty shop operators in the City of Chicago were not organized nor belonged to any employees' association or trade union (Rec. pps. 4, 8, 9, 10),

(2) On or about April 30, 1937, the defendant officials and representatives of the local trade union, known as the Hairdressers & Cosmetologists Union, Local 548-D (which it was asserted held a charter from the International Barbers' Union, who in turn were members of the American

Federation of Labor), called upon the plaintiff-employer with the request that he enter into a closed shop agreement with them (Rec. p. 4). The employer stated that he would sign such a contract if the employees joined the trade union. Accordingly, he permitted the union organizers to speak to the employees (Rec. p. 4). When the organizers spoke to the employees, said employees refused to join the trade union (Rec. pps. 4, 8). These employees stated that they had no dispute or contest with the employer and were well satisfied with their wages, hours of labor and working conditions; that they had previously joined a union and that the officials of the trade union "made away" with the membership fees and dues and that the union lasted but a short time; that they felt that a trade union could offer them no greater benefits than they were already receiving from the state women's minimum wage and hour legislation, as well as health and sanitation legislation of both the State of Illinois and the City of Chicago (Rec. p. 9).

(3) In spite of the refusal of the employees to join the trade union, the union organizers insisted that the employer sign a closed shop agreement and compel his employees to join the trade union or upon their refusal, discharge them and hire union members. When the employer refused so to do, a strike was called, picketing commenced, and two and sometimes three pickets walked back and forth in front of the building and entrance to the store premises of the employer, carrying banners upon which the following legend appeared: "This beauty shop is unfair to organized labor; Hairdressers & Cosmetologists Union Local 548-D, American Federation of Labor and Chicago Federation of Labor" (Rec. p. 5). It is charged and asserted in the complaint that the legends were untrue and libelous. This charge is sustained by the decree which enjoins and restrains the carrying of the banners, containing this libelous

legend. It is noted that clause "c" of the injunctional order (Rec. p. 38) only restrains the carrying of banners upon which the aforementioned legend appears (Rec. p. 38).

(4) In addition to the foregoing, the bill of complaint further asserts that automobiles were parked in front of the plaintiff's place of business and were seen passing the premises during the day and evening; one of the customers was accosted by one of the men sitting in the automobile and threatened (Rec. p. 6); one of the members of the picket line also accosted one of the customers and threatened her by telling her that she had better not go into the shop because it was a "scab shop" (Rec. p. 6). A secondary boycott was being maintained by the defendants in concert with other trade unions or trade union members (Rec. p. 11).

This case first reached the Supreme Court of Illinois on appeal by the plaintiffs from an order dismissing their complaint for want of equity and dissolving the preliminary injunction which restrained the defendants in the same manner as ultimately restrained by the final decree. Upon reversal, a final decree was entered based upon the record as hereinabove epitomized, and the Supreme Court of Illinois thereafter dismissed the writ of error proceeding and refused to modify its original order and opinion filed in support thereof. In its opinion, that court stated:

(a) That the ultimate objective and purpose of the defendants were not made lawful by the Anti-Injunction Act of Illinois; that this act as construed by the Supreme Court of Illinois in *Meadowmoor Dairies* v. *Milk Wagon Drivers Union*, 371 Ill. 377, (in which certiorari was denied by this court) was limited to strikes and campaigns between employees and employers or duly authorized representatives and bargaining agents of employees and employers; that the ultimate objective of the trade union and its officials in this case was unlawful under the

substantive law of the State of Illinois; and that therefore being engaged in a strike and campaign which was contrary to the common law of the state, the means used to carry out the ultimate objective, to-wit: picketing, patrolling, carrying of banners, etc., was equally unlawful and was properly enjoined; that such means and as shown by the record constitute a continuing and continuous trespass which courts of equity in Illinois had power to enjoin and restrain;

(b) That even though it may be assumed for the purposes of discussion that the ultimate objective might be lawful, it clearly appeared from the record in this case that violence, intimidation and threats, as well as the carrying of banners containing libelous and untrue legends, characterized all of the means, including the so-called peaceable activities as part and parcel of the trespass and constituted a campaign of force.

(c) And it is further stated in this opinion that courts of equity in Illinois have jurisdiction and power to restrain continuing existing libels as being continuous and continuing trespasses.

Thus there is presented by this record and petition for writ of certiorari the following questions and issues:

Is the declaration of common law by the court of last resort in the State of Illinois, to-wit: that because the ultimate objective of the trade unions is unlawful, and accordingly, that the means used to accomplish this unlawful objective is also unlawful, that therefore the decree properly enjoined picketing, patrolling and the carrying of banners containing libelous statements, a denial of freedom of speech under the due process clause of the Fourteenth Amendment; and is the common law of the State of Illinois which says that even where the objective is law-

ful, that where violence, intimidation, threats and a secondary boycott take place and libelous banners are carried, all of which *per se* are well recognized illegal acts, that the peaceful activities are tarred with the stick of being a part of an entire illegal campaign and may be enjoined, an unconstitutional denial to the defendants of freedom of speech as guaranteed by the due process clause?

SUMMARY OF ARGUMENT.

I.

Under the common law of the State of Illinois as enunciated by its court of last resort, the ultimate purpose sought to be attained by the defendant trade unions by the strike is unlawful. Therefore, the decree enjoining and restraining all picketing and patrolling does not deny to the defendants liberty of freedom of speech under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Gompers v. *Buck Stove & Range Co.*, 221 U. S. 418.
Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229.
Duplex Printing Co. v. *Deering*, 254 U. S. 443.
American Steel Foundries v. *Tri-City Council*, 257 U. S. 184.
Truax v. *Corrigan*, 257 U. S. 312.
Dorchy v. *Kansas*, 272 U. S. 306.
Brinkerhof-Faris Trust & Sav. Bank v. *Hill*, 281 U. S. 673.
West Coast Hotel Co. v. *Parrish*, 300 U. S. 379.
Senn v. *Tile Layers Union*, 301 U. S. 468.
Erie Railroad Co. v. *Tompkins*, 304 U. S. 64.
Thornhill v. *Alabama*, U. S. Case No. 514 (October Term, 1939, decided April 22, 1940).
Carlson v. *California*, U. S. Case No. 667 (October Term, 1939).
Ossey v. *Retail Clerks Union*, 326 Ill. 405.
Fenske Bros. v. *Upholsterers Union*, 358 Ill. 239.
Meadowmoor Dairies v. *Milk Wagon Drivers Union*, 371 Ill. 377.

Swing v. *American Federation of Labor*, 372 Ill. 91.
Section 2a, Chap. 48, Ill. Rev. Stat. 1939 (Anti-Injunction Law of Ill.).
29 USCA, Sec. 20 (Sec. 52) Sec. 20, Clayton Act.
Frankfurter & Green, The Labor Injunction, p. 25.

II.

A court decree which enjoins so-called peaceful picketing where such picketing is a part of a campaign of a trade union in which violence, intimidation, threats and secondary boycotting take place and in which libelous statements are made, does not deprive defendants of freedom of speech as guaranteed by the due process clause of the Fourteenth Amendment.

Gompers v. *Buck Stove & Range Co.*, 221 U. S. 418.
Schenck v. *U. S.*, 249 U. S. 47.
American Steel Foundries v. *Tri-City Council*, 257 U. S. 184.
Near v. *Minnesota*, 283 U. S. 697.
Thornhill v. *Alabama*, U. S. Case No. 514 (October Term, 1939).

III.

The constitutional guarantees under the due process clause of the Fourteenth Amendment, protecting freedom of speech, are not applicable to judgments and decrees of State Courts in proceedings where the rights of private parties are determined under the substantive law of the State.

Palko v. *Connecticut*, 302 U. S. 319.
Graves v. *New York, ex rel O'Keefe*, 306 U. S. 466.
Warren, New Liberty Under the Fourteenth Amendment, 39 Har. Law Rev. 431.

ARGUMENT.

I.

Under the common law of the State of Illinois as enunciated by its court of last resort, the ultimate purpose sought to be attained by the defendant trade unions by the strike is unlawful. Therefore, the decree enjoining and restraining all picketing and patrolling does not deny to the defendants liberty of freedom of speech under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

By legislation in the State of Illinois, peaceful picketing and patrolling by a trade union in which employees of a plant are members and where the strike is carried on for the usual trade union objectives in connection with wages, hours of labor and working conditions, is lawful and cannot be enjoined and restrained by the courts of chancery. (Anti-Injunction Law, Sec. 2a, Chap. 48, Ill. Rev. Stat. 1939; *Fenske Bros.* v. *Upholsterers Union,* 358 Ill. 239); and it has accordingly been stated that peaceable picketing to accomplish lawful objectives is lawful *per se.*

The Anti-Injunction Act of Illinois is a prototype of Section 20 of the Clayton Act, passed by Federal Congress, and the construction of that Act by the Supreme Court of Illinois is consistent with decisions and opinions of this Court construing and apply Section 20 of the Clayton Act. (*Ossey* v. *Retail Clerks Union,* 326 Ill. 405; *Fenske Bros.* v. *Upholsterers Union,* 358 Ill. 239; *Duplex Printing Co.* v. *Deering,* 254 U. S. 443; *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184). Therefore, we are not con-

fronted in this case with a general statute which prohibits all employee or trade union activities with both lawful and unlawful objectives, nor is there an attack made upon any legislation passed by the legislature of the State of Illinois. This case does not involve the usual contest between an employer and his employees or trade union representatives of the employees, and does not concern itself with the ordinary disputes involved in a contest. This record discloses that the trade union defendants were not the duly authorized bargaining agents of the employees. To the contrary, the trade union was attempting to force itself on the employees to compel them by the strike to designate the trade union as the bargaining agency. The trade union sought to compel the employer to enter into a closed shop agreement under which he would agree to employ none but members of the trade union and to discharge those employees who would not become members. This case involves solely a question as to whether or not a trade union can compel plant unionization against the will and desires of the employees. It is further charged and asserted in the complaint and supported by the decree that none of the employees in the industry itself were members of any trade union—much less of the trade union defendants.

The Supreme Court of Illinois, consistent with its decision and opinion in the case of *Meadowmoor Dairies, Inc.*, v. *Milk Wagon Drivers Union*, 371 Ill. 377, and in the case at bar enunciated and declared that it was the common law of the State of Illinois that the trade unions do not have a lawful right to enforce unionization against the will of both the employees and employer; that therefore the trade union defendants were not conducting a strike for a purpose which was lawful under the common law of the State. Consistent with this declaration of substantive law, it necessarily follows that any means used in an attempt to enforce

the unlawful purpose are tarred with the same stick of illegality, and it was so held and declared by the Supreme Court of Illinois. (*Meadowmoor Dairies, Inc.*, v. *Milk Wagon Drivers Union*, 371 Ill. 377; *Swing* v. *American Federation of Labor*, 372 Ill. 91.)

Defendants here contend that regardless of whether or not the object to be attained by the trade union is lawful or unlawful, that the due process clause of the Fourteenth Amendment protects picketing, patrolling and the carrying of banners and without exception; that, therefore, the courts of the State cannot under any circumstances or conditions enjoin and restrain picketing and patrolling; that this decree therefore is a denial to them of liberty of speech as defined and enunciated by this Court in the freedom of speech cases; and in support of which they cite the case of *Senn* v. *Tile Layers Union*, 301 U. S. 468. They will undoubtedly also seek comfort in the opinions of this Court in the cases of *Thornhill* v. *State of Alabama*, Case No. 514, October Term, 1939, decided April 23, 1940: and *Carlson* v. *State of California*, Case No. 667, October Term, 1939. All of the cases, including the *Carlson* and *Thornhill* cases, deal and treat with legislation general in language and restricting the right to speak freely, regardless of whether or not the ultimate objective to be attained is lawful or unlawful. The *Leaflet* cases, particularly the *Schneider* (Milwaukee) case involve general statutes which attempt to declare ordinary and lawful distribution of literature to be unlawful if carried on at a particular place, to-wit: the public streets; and it is declared by this Court that the reasons assigned by those seeking to uphold the legislation were not sound when an attempt is made to restrict dissemination of information in those places where the people are entitled to obtain knowledge of matters and things within the public domain and of which the public should be concerned and

should have knowledge. In the *Thornhill* and *Carlson* cases, it is quite apparent from a reading of the opinion that this Court was of the opinion (first) that labor questions and problems are of public concern; (second) that the public are vitally interested in these problems and should have the right to be informed of the cause, reasons and position of the parties to the controversy; (third) that the statutes attacked were too general in scope and were aimed at a restraint of peaceful activities for lawful purposes, regardless of the ultimate objective to be attained in a strike. Therefore it was pronounced that the publicising of labor disputes in a peaceful way by pamphlet or word of mouth is secured to all persons against abridgement by the States. We respectfully submit that is not intended by this Court and these opinions to declare that the liberty of freedom of speech in the labor cases can be defined as an "unbridled license to speak." It is recognized in these opinions that the States, within certain limitations, have the right to control by legislation or court decisions a reasonable policy with reference to dealing and treating with specific evils which may exist in labor disputes and that there necessarily are exceptions to this Fourteeenth Amendment guarantee of freedom of speech.

This Court has always recognized that basically the destiny and welfare of the people of the States is a matter of state public policy and wholly within state control, with the only exception, to-wit: such social and economic activities as come within the grant of power to the Federal government under the Federal Constitution. (*Truax* v. *Corrigan*, 257 U. S. 312; dissenting opinions in *Truax* v. *Corrigan*, 257 U. S. 344, 372; *Senn* v. *Tile Layers Union*, 301 U. S. 468; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379.) Accordingly, therefore, the wisdom of the public policy declaring what is or what is not the social and economic welfare

of the people of the State is ordinarily not the subject matter of review in this Court, whether so declared in legislation or enunciated by the State courts as a matter of substantive law. When questions arise as to the constitutionality of court decisions and of the legislation dealing and treating solely with intrastate problems, this Court has said that it is duty bound to accept the construction placed upon legislation by the courts of last resort of the State and by the declaration of the substantive law by the State and cannot, in passing judgment, declare what the law should be; but that review is confined solely to the one question as to whether or no legislation on its face or as construed or the substantive law as declared, defies the Federal Constitutional grants of power. (*Senn* v. *Tile Layers Union,* 301 U. S. 468; *Erie Railroad* v. *Tompkins,* 304 U. S. 64; *Brinkerhoff-Faris Trust & Savings Bank* v. *Hill,* 281 U. S. 673.) This Court has always recognized that the right to carry on business, whether it be called liberty or property has value and is protected by the Constitution of the United States; and accordingly, this Court has also said that interference with this liberty or property right without just cause is unlawful. (*Gompers* v. *Buck Stove & Range Co.,* 221 U. S. 418; *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184; *Truax* v. *Corrigan,* 257 U. S. 312; *Dorchy* v. *Kansas,* 272 U. S. 306.)

Accordingly, and in dealing and treating with the labor problems and in *Dorchy* v. *Kansas, supra,* it is said: "Neither the common law nor the Fourteenth Amendment confers the absolute right to strike." All text writers have recognized that the doctrine of *damnum absque injuria* in the labor cases is not all-embracing and does not cover each and every trade union activity; and it is said that the strike, the boycott and the picketing can win immunity only if the ultimate objective sought to be attained is lawful. (Frankfurter & Green, The Labor Injunction, p. 25.)

The common law of the State of Illinois is consistent with the declared substantive law found in the opinions of this Court, wherein Section 20 of the Clayton Act has been construed. This Court has declared that picketing and patrolling can be maintained only where the contest involves an immediate relationship of employer and employee; that trade union campaigns carried on by stranger trade unions who were not the duly authorized representatives of the employees to enforce closed shop agreements and general unionization campaigns were unlawful in purpose, and therefore the means used, even though recognized in themselves as lawful, where the purpose is unlawful, can be properly enjoined as part of an entire unlawful campaign. (*Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229; *Duplex Printing Co.* v. *Deering*, 254 U. S. 443; *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 184.) In the case of *American Steel Foundries* v. *Tri-City Council, supra*, this Court sustained the right of the trade union to carry on the strike by peaceful methods, upon the ground that the strike was taking place in a small community and that the entire membership of the trade unions were at one time or another employees of the plant in question; and that in the event the plant was thereafter to be operated with a full compliment of employees, their members would again be employed. Therefore, the strike being carried on for the purpose of dealing and treating with wages, hours of labor, etc., was being maintained for a purpose which was lawful.

We suggest and submit that taking the substantive law as enunciated by the Supreme Court of Illinois and applying such law to the record that the defendants were engaged in an unlawful objective and purpose, and that therefore all of the activities were properly enjoined; that the injunctional decree may be treated as an exception to the general rule announced in the *Thornhill* case, and that this

injunctional decree can be properly sustained under the decisions and opinions of this case in the cases of *Thornhill* v. *State of Alamaba* and *Carlson* v. *State of California, supra.*

It is urged and argued that this court decree creates a previous restraint. This decree attempts to cover only a present situation where the defendants are engaged in an unlawful objective and are guilty of continuing a published libel distinguished from a threatened libel. This decree merely restrains the further publication of what the Court finds to be libel. If there is a change in the picture and the status of the parties or their activities change, this Court decree would not be binding upon them. For instance, if, after the decree was entered the employees voluntarily became members of the trade union and designated the trade union as their bargaining agent, then the court decree could not be enforced; if the employer thereafter refused to enter into a closed shop agreement, the present libelous statements would thereupon become statements of truth. Under such circumstances and conditions, we respectfully submit that the decree would in effect be nullified by the action of the paries; that under such circumstances and conditions new and different substantive rights would come into play and that the decree could not and would not be enforceable. Therefore, we submit that the court decree covers only one particular situation and status and can be effective and applied only so long as the defendants pursue and continue in their present unlawful purpose and activities. We submit that this is not the creation of a previous restraint which applies for all times in the same manner and with like effect as to previous restraint legislation upon which this Court has heretofore been called upon to express judgment.

It is further urged and argued that the ultimate objective of the trade union is lawful, and that this Court

should so declare. This Court is not a court of errors and we reiterate that this Court has never attempted to declare what the common law of a State should be. Therefore, this Court will not now and in this case concern itself with a declaration of what should be the substantive law of the State; the constitutionality and not the wisdom of enunciated law of courts of last resort of a State is the test. (*Brinkerhoff-Faris Trust & Savings Bank* v. *Hill*, 281 U. S. 673; *Senn* v. *Tile Layers Union*, 301 U. S. 468; *Erie Railroad* v. *Tompkins*, 304 U. S. 64.)

We therefore respectfully and humbly urge and submit that the only question presented to this Court is whether or not the substantive law (common law) of the State of Illinois as declared in this case by the Supreme Court of Illinois, results in a denial to the defendants of the liberty of freedom of speech protected by the due process clause of the Fourteenth Amendment; and that this record does not present a substantial Federal question. Certainly, that part of the decree complained of is not violative of the freedom of speech guarantees of the Fourteenth Amendment.

II.

A court decree which enjoins so-called peaceful picketing where such picketing is a part of a campaign of a trade union in which violence, intimidation, threats and secondary boycotting take place and in which libelous statements are made, does not deprive defendants of freedom of speech as guaranteed by the due process clause of the Fourteenth Amendment.

This record presents a factual situation where, in addition to the peaceful picketing and patrolling there were acts of violence and intimidation; there were also libelous legends placed on the banners carried by the picketers; and

further, that a secondary boycott was being fostered, aided and abetted by the defendants. Based upon this record, the Supreme Court of Illinois in its opinion in this case held as a matter of substantive law that the entire conduct was one of trespass, and that the peaceful activities were tarred with the stick of the trespass; that therefore the entire campaign (even assuming that the purpose was lawful) consisted of unlawful means used to obtain an objective; that there could be no separation between the so-called lawful and unlawful activities, and that the entire campaign was an unlawful one. We submit that in passing judgment this Court is bound by such finding of common law; that this conclusion of the court of last resort of Illinois is consistent with substantive law as enunciated by this Court. (*American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184.) This record, therefore, presents a picture of force. This Court has said that "the most stringent construction of free speech would not protect a man * * * from an injunction against uttering words which have all the effect of force." (*Schenck* v. *U. S.,* 249 U. S. 47, at p. 52; *Near* v. *Minnesota,* 283 U. S. 697, at p. 717; *Gompers* v. *Buck Stove & Range Co.,* 221 U. S. 417.)

Thus, in this case, there is presented a picture of a clear and present danger of the destruction of property and the invasion of the right of privacy. (*Schenck* v. *U. S.,* 249 U. S. 47; *Thornhill* v. *State of Alabama,* Case No. 514.)

III.

The constitutional guarantees under the due process clause of the Fourteenth Amendment, protecting freedom of speech, are not applicable to judgments and decrees of State Courts in proceedings where the rights of private parties are determined under the substantive law of the State.

We recognize and concede that this Court has defined the word "state" as it appears in the due process clause of the Fourteenth Amendment, to include therein judgments of the courts of a State and based upon the substantive law of a State. All of the cases in which this principle has heretofore been enunciated by this Court have been cases involving what has been termed to be "procedural due process." This record presents the question as to whether or not the word "state" shall be defined as including the judgments of a court of last resort, based upon a record dealing with the liberty of freedom of speech. Historically, the freedom of speech sought to be protected by the framers of the Constitution was the previous license restrictions that had existed under the English system of government. It was the right to grant or withhold license to speak on purely public questions with which our forefathers were concerned. (See Warren, New Liberty Under Fourteenth Amendment, Harvard Law Review, p. 431.) It was recognized that the thirteen original States protected the right of freedom of speech by their own Constitutions, and that the purpose of the First Amendment to the Constitution, therefore, was to protect the citizens of the States as against encroachment by the new government on the already established right of the citizens of the States to discuss problems and questions arising under the granted powers to the new government. (See Warren, '39 Harvard Law Review, p. 431.)

It is noted that the First Amendment to the Constitution
s first proposed, definitely provided for a restraint on the
tates as well as the Federal Government. As enacted, it
a restraint only upon the legislative branch of the Fed-
ral Government, for it reads, "Congress shall not make
ny law abridging freedom of speech * * *." The succeed-
ng seven Amendments, including the Fifth Amendment
he due process Amendment) by their very language em-
race all branches of the Federal Government. Therefore,
istorically, and as appears from a reading of the first
ght Amendments to the Federal Constitution, we find
hat freedom of speech restriction limits itself to *congres-
ional action,* while the succeeding seven are not limited
o any particular branch of the Federal Government. Up
ntil 1925 this Court consistently announced that the free-
om of speech guarantees of the First Amendment to the
ederal Constitution was not a restraint upon States, but
olely upon the Federal Congress; that, therefore, the Four-
eenth Amendment could not be construed to include there-
the limitations and restrictions of the First Amendment.
he right of freedom of speech was never construed as a
ght or liberty created by the Fifth Amendment. Both of
hese Amendments were presented to the people and passed
t the same time. If it were considered that the Fifth
mendment protected the liberties and rights created by
he First Amendment, it is logical to assume that the First
mendment would not have been presented for adoption.
herefore, it is only logical to say that the Fifth Amend-
ent protected liberties and rights which were not pro-
ected by the First Amendment, and that the First Amend-
ent protected liberties and rights which it was not intended
o be included in the Fifth Amendment. Since 1925 the
irst Amendment has been carried over into the Four-
eenth Amendment by what this Court has said is a "proc-
ss of absorption." (*Palko* v. *State of Connecticut,* 302

U. S. 319.) Can it be said that in absorbing the First Amendment into the Fourteenth Amendment, part of the language as it appears in the first Amendment is to be disregarded? We submit that in the absorptive process the original inherent intent of the limitation and restriction must be recognized and carried over; that, therefore, the First Amendment being a restraint solely on the legislative branch of government, it cannot be rightfully said that the result of the absorption creates a restriction or limitation over all branches of the State Government, including the courts of the State. So to do would be to give the First Amendment an interpretation which was never intended and would result in what this Court has said in *Graves* v. *New York, ex rel O'Keefe,* 306 U. S. 466, is an occasional tendency on the part of this Court to encrust unwarranted interpretations upon the Constitution, and thereafter to consider merely what has been judicially said by the Constitution rather than to be primarily controlled by a fair conception of the Constitution. We respectfully submit that the ultimate touchstone of constitutionality is the Constitution itself and not what might have been said about it.

CONCLUSION.

Defendants seek the enunciation by court decision of a definition of the term "labor dispute" similar to that which is found in the Norris-LaGuardia Act of the Federal Congress. The States having had the opportunity of declaring a policy similar to the Norris-LaGuardia Act, but twelve have passed legislation so defining the term "labor dispute." Fourteen States, however, including Illinois, have enacted laws similar to Section 20 of the Clayton Act; twenty-two of the States deal and treat with the labor ques-

tions and the term "labor dispute" on the basis of the common law of the State. The effect of the requested declaration of substantive law is far reaching. This Court's definition of the term "interstate commerce" as used in the labor cases and under the Wagner Act of Congress has brought (as a practical matter) all of the large employers of labor in the United States under the control of the Federal Government, and to all intents and purposes, has brought cases arising in such employment under the Norris-LaGuardia Act. Thus it must be conceded that by far and large the majority of the persons employed in the United States and the employers as well are subjected to the definition of the term "labor dispute" as it appears in the Norris-LaGuardia Act. This has resulted in taking away from the States practically all control over the labor question and the labor problem. Thus we submit that the public policy of the States in dealing with the labor problems has been limited solely to small business establishments engaged in intrastate business. This means that the State control is limited to the tradesmen distinguished from the manufacturing business. This includes approximately 1,300,000 business men who employ nine or less people.

With the present recognized and conceded membership and financial strength of the five major national trade unions, particularly the defendant American Federation of Labor, it needs no lengthy exposition to demonstrate that the trade union in contests with these tradesmen is by far and large the strongest of the two antagonists. It is common knowledge that these small tradesmen can continue to exist only because they themselves labor in their business; and it must be recognized that the trade union movement does not permit an employer himself to labor. Therefore, it necessarily follows that if the position taken by these defendants were to be sustained by this Court, the immediate result would be, (a) complete unionization of

these small establishments; (b) the employer would be forced to cease laboring in his own business; all with the ultimate recognizable effect of completely putting him out of business. These tradesmen constitute what has been termed the "middle class"; they as current history demonstrates, constitute one of the "bulwarks" of democratic processes. Democratic government has survived only where the middle ground is taken; extreme swings to the right or left have resulted in a total destruction of the democratic system.

We therefore respectfully and humbly submit that the prayer of the petition for writ of certiorari as made by these defendants should not be granted.

Respectfully submitted,

MYER N. ROSENGARD,
SAMUEL A. RINELLA,
Counsel for Respondents.

EUGENE W. SCHOFLER,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 56

AMERICAN FEDERATION OF LABOR,
JOHN FITZPATRICK,
CHICAGO FEDERATION OF LABOR, ET AL.,
Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN,
NAN CHAPMAN, ET AL.,
Respondents.

Brief on Behalf of Respondents.

MYER N. ROSENGARD,
SAMUEL A. RINELLA,
Counsel for Respondents.

EUGENE W. SCHOFLER,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 56

AMERICAN FEDERATION OF LABOR,
JOHN FITZPATRICK,
CHICAGO FEDERATION OF LABOR, ET AL.,
Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN,
NAN CHAPMAN, ET AL.,
Respondents.

Brief on Behalf of Respondents.

MAY IT PLEASE THE COURT:

Jurisdiction in this Court was invoked and certiorari was allowed under Section 237(b) of the Judicial Code (USCA, Title 28, Sec. 344).

It is asserted and charged by petitioners that certain restraining provisions (but not all) of a final decree entered in the cause as affirmed by the Supreme Court of Illinois, are void on their face; it being contended that the injunctional provisions complained of defy the "liberty" of "freedom of speech" as protected and guaranteed by the "due process" clause of the Fourteenth

Amendment to the Constitution of the United States. The opinion of the Supreme Court of Illinois is officially reported in 372 Ill. 91. This opinion also appears in the record filed in this Court (Rec. p. 24).

We take the liberty of referring to the parties as they appeared in the state courts—petitioners as "defendants," and respondents as "plaintiffs." Italics are supplied unless otherwise noted.

Questions Presented.

The case is brought to this Court from the Supreme Court of Illinois. The proceedings were commenced in the state *nisi prius* court by a complaint in chancery filed by an employer, *with whom all of his sixteen employees* (all women) *joined as plaintiffs.* The basis of the complaint against the defendants was that though none of the employees were members of any of the trade union defendants and although the employer did not refuse to enter into a closed shop agreement (providing his employees would become members of the trade unions, which it is charged the employees refused to do) the defendants (the trade union representatives, officials and the trade unions) called the usual strike and caused the employer's premises to be picketed by pickets who were neither previous nor present nor expectant employees and who were total strangers to the employer and employees. These pickets walked to and fro on the sidewalk in front of and close to the place of business, and passed the entrance to the place of business, carrying banners on which legends appeared charging that the employer was unfair to union labor and to the defendant trade unions. In addition thereto, the complaint asserts that the pickets threatened customers and that the union officials were maintaining, aiding and abetting a secondary boycott.

ıe defendants filed answers to the complaint. By these
vers they justified their conduct by asserting that their
ities were protected by the State Anti-Injunction Act
. 2a, Chap. 48, Ill. Rev. Stat. 1939). They contended
this Act (theretofore construed by the State Supreme
t as being a prototype of Section 20 of the Clayton
of Congress of 1914) which prohibited the Illinois
ts from issuing injunctions against peaceful picketing
the carrying of banners, properly construed, was ap-
ble to their activities in the case at bar.

ıe trial court sustained a motion to dismiss the com-
nt, based upon this contention, and accordingly dis-
ed a temporary injunction theretofore issued. The
rmediate Appellate Court construed the Anti-Injunc-
Act as applying in its restrictive provisions solely to
paigns and activities of trade unions by the strike,
eting, etc. where employees of a plant who were mem-
of a trade union were participating in the contest
seeking to better their employment conditions, hours,
es, etc.; that it appearing from the complaint filed
none of the employees of the employer were either
bers of a trade union or were themselves complaining
eeking to better their own wages and working condi-
s, but to the contrary were well satisfied and not com-
ning, that the Act, properly construed, did not offer
asserted protection. The court further stated in its
ion that under the substantive law of the State of
ois the ultimate purpose of the trade unions was un-
ful; that therefore the ultimate objective being unlawful,
neans used (the picketing, etc.) in carrying out such
wful objective were equally unlawful.

ased upon this opinion, the trial court's order dismiss-
the complaint was reversed. On appeal to the Supreme
rt of Illinois (the court of last resort) the decision
opinion of the Appellate Court was sustained and the

reversal order was affirmed (Rec. p. 24). Thereafter, the Appellate Court (having before it a record which included the complaint, the answers of the defendants, its own opinion and the opinion of the Supreme Court of Illinois) and in accordance with the Civil Practice Act of the State of Illinois, entered a final decree (Rec. p. 36). The defendants did not offer any evidence in support of their answers, nor did they seek to compel the plaintiffs to maintain their complaint by proof.

Immediately after the entry of this decree, the defendant sued out a writ of error from the Supreme Court of Illinois and brought the decree and record of the Appellate Court to the Supreme Court. The only errors assigned by them in the Supreme Court were (Rec. p. 39):

(a) That the decree interferes with the freedom of speech guarantees of the due process clause of the Fourteenth Amendment to the Constitution of the United States; and

(b) That the decree interferes with their freedom of speech and assembly, and denies to them the privileges and immunities of citizens of the United States.

The Supreme Court of Illinois affirmed the Appellate Court decree by its order dismissing the writ of error proceeding (Rec. p. 46).

While in the courts of the state, the defendants justified their activities under the Anti-Injunction Act above referred to, they do not complain nor do they here challenge the constitutionality of either the Act itself on its face, or as construed and applied by the Supreme Court of Illinois. Although the assignment of errors filed in the Supreme Court of Illinois in the writ of error proceedings challenges the Appellate Court decree because it is charged that said decree denies privileges and immunities guar-

anteed by the Fourteenth Amendment to citizens of the United States, such claim is not made here and in this Court. We take it that this assignment of errors has been abandoned because the record here does not disclose that the individual defendants are citizens of the United States; (*Hague* v. *C.I.O.*, 307 U. S. 518-523); and that it is conceded by the defendants that the asserted liberty is not one which is protected by the privileges and immunities section of the Fourteenth Amendment. (*Hague* v. *C.I.O.*, 307 U. S. 518.)

Therefore, there is presented to this Court for consideration and determination but one question: Is that part of the decree of the state court which restrains the defendants from picketing and from carrying banners with legends asserting that the employer-plaintiff is unfair to organized labor and to the defendant trade unions void on its face in that it defies the due process clause of the Fourteenth Amendment to the Constitution of the United States? Is this injunctional decree a denial of the liberty of freedom of speech as protected by the due process clause of the Fourteenth Amendment?

STATEMENT.

Because of certain statements appearing in the brief filed by the defendants, wherein attention is called to assertions made in the answers to the complaint filed in the trial court, and inferences are drawn therefrom in the argument, we are compelled at this point to challenge such assertions of fact and the inferences as drawn.

In the Civil Practice Act of Illinois of 1934 which governs and regulates procedure and practice in all Illinois courts, both *nisi prius* and courts of review, it is provided in Section 188 (Chap. 110, Ill. Rev. Stat. of Ill. 1937):

> "No special findings of fact or certificate of evidence shall be necessary in any case in equity to support the decree."

Where the losing party does not preserve and file a certificate of evidence, all presumptions are indulged in favor of the decree; and it is presumed, (even without factual findings appearing in the decree), that the decree is amply sustained by the evidence—he who attacks has the burden of preserving the evidence. (*Sauter* v. *Pickrum*, 373 Ill. 541; *Prudence* v. *Ill. Athletic Club*, 284 Ill. App. 210.)

By Section 216 of the same Act, the reviewing court is given the authority to enter final decrees and to hear evidence if necessary. The decree herein complained of was entered in the reviewing court (the Appellate Court), after that court had reversed the trial court's order dismissing the complaint for want of equity appearing on its face; and after the court of last resort in the State (the Supreme Court) had affirmed the Appellate Court's reversal order. At the time of the entry of the decree there was before the Appellate Court all pleadings filed, including the defendants' answers. These pleadings (and the final decree, both reviewing Court's orders and the opin-

ion of the Supreme Court of Illinois on the first appeal) constitute the entire record filed in this Court. Immediately after the entry of the final decree, the defendants sued out a writ of error from the Supreme Court of Illinois (Rec. p. 39). Upon the issuance of the writ, they made a motion in that court (Rec. p. 41) wherein they ask that the record filed in the court on appeal from the Appellate Court's reversal order (the first appeal) be accepted and treated as part of the record in the writ of error proceedings. In their moving papers, the following appears (Rec. p. 41):

> " . . . In the writ of error here presented, the parties are the same as in No. 25,083, (the first appeal) and the issue here presented is *identical* with that in No. 25083, except that there a temporary injunction was involved, whereas there is here involved an order of the Appellate Court making such injunction permanent. This is therefore a continuation of the same case, and is instituted for the purpose of obtaining a final judgment of this Court with respect to such permanent injunction, which was entered by the Appellate Court in accordance with the mandate issued to that Court by this Court in No. 25083."

By reason of this statement appearing in the moving papers and a further statement appearing in their brief filed in the Supreme Court in the writ of error proceedings (the second appeal) plaintiffs filed a motion in the Supreme Court of Illinois, asking that the writ of error be dismissed (Rec. p. 43). Suggestions were filed in support of the motion. In these suggestions, plaintiffs quoted from what appears in the briefs filed by the defendants in the Supreme Court of Illinois, which quotation is found in the record here at page 44 and is as follows:

> "The writ of error is here presented with knowledge that this court has fully settled all issues of the case in

> a prior review thereof and that the decree entered by the Appellate Court is in compliance with the mandate of this court . . . If this court adheres to the position in *People* v. *Militzer*, 301 Ill. 284, page 287, that issues once decided on review will not be again considered on a second review, a final order in this case may properly dismiss the writ of error on the ground that all issues of the case have been settled on prior appeal and that the decree entered by the Appellate Court is in conformity with the mandate issued to the Appellate Court by this Court."

Therefore, the defendants by their moving papers, conceded and admitted that the issues involved in the second appeal were no different than on the first appeal, and that the entry of a final decree in no way changed these issues. They cannot in this Court take a different position, viz: that the final decree presents issues which were different than the issues presented to the Illinois courts of review on the first appeal involving the preliminary injunction. Therefore, by preserving no certificate of evidence and by offering no evidence in the Appellate Court, it must be presumed (a) that they did not challenge the factual presumptions arising from the decree itself and that they confessed the facts set forth in the complaint; otherwise they would have insisted on proof being made by the plaintiffs in the Appellate Court, or they themselves would have offered challenging evidence in that court; or they would have insisted that the case go back to the trial court for hearing as to the merits; or (b) that the defendants could not make proof of the facts as set up in their answers.

Suffice it to say, therefore, that the decree and presumptions arising therefrom (which presumptions cannot be challenged here in this court) are tantamount to judicial findings of fact, viz: that the facts pleaded in the complaint are true and have been established; and that the state-

ments of fact appearing in the answers have been considered by the court and either found not true or that they were not sustained by the evidence.

Therefore, the statement appearing in defendants' brief (p. 3) which quotes from their answer in substance as follows:

> " . . . more than ninety per cent of some 200 beauty shop operators employed in the area were members of the union; that plaintiff's (Swing's) employees were not members of the union but they were threatened with discharge if they joined the union . . . "

cannot be accepted as either a correct statement of fact or as maintained by the record, when the contrary appears in the complaint (Rec. p. 7).

> "The plaintiff (employer) is informed and believes that there are a large number of beauty shops in the City of Chicago, many of which employ more operators than he employs, whose employees are not members of the trade union; that there never has been nor is there now any picketing done by the defendants or their agents in front of other shop . . . In truth and in fact the plaintiff-employer pays his employees the prevailing wage in the City of Chicago; his employees work under superior conditions in a building considered to be one of the best in the City of Chicago, for a beauty shop business . . . the wages and working conditions in the other shops are lower and not as good as those in his shop." (These statements of fact were affirmed by all of the employees, Rec. p. 9.)

The decree (Rec. p. 38) enjoined and restrained threats, intimidation, violence and the use of opprobrious epithets, in addition to enjoining and restraining so-called peaceable picketing and the libelous statements appearing in the

banners. Therefore, it must be presumed that that part of the decree is also sustained by the record; otherwise the Appellate Court would not have found it necessary or advisable to enjoin threats, etc. in the decree. This part of the decree is sustained by the statements of fact appearing in the complaint, viz: the threatening of two customers and the maintaining, aiding and abetting of a secondary boycott (Rec. pps. 6 and 11). Because they appear in the decree, it necessarily follows that the established facts made it necessary to enjoin such conduct; and it cannot be asserted here and at this time that certain of the statements of fact appearing in the complaint are conclusions of the pleader.

Because of the foregoing and other arguments made in the brief, and although the defendants have not deemed it necessary to give a resume of the pleadings, we deem it advisable at this time to call attention to the following which appears in the complaint (Rec. pps. 1-13):

The bill of complaint was filed by an employer, together with all of his sixteen employees (all women). The pleading states that there was no controversy of any kind between the employer and his employees—much less any existing conflict as to wages, hours or working conditions. It affirmatively appears that the employees were well satisfied with their wages, working conditions and hours, and that none of the employees were members of the defendant trade unions (Rec. pps. 8, 9 and 10).

In the month of April, 1937, organizers for the defendant Hairdressers and Cosmetologists Union, Local No. 548D, called upon the employer, with the request that he enter into a closed shop agreement with them, and employ none but union members (Rec. p. 4). *The employer suggested that he would enter into such relationship providing he would not have to discharge any of his present employees. He further suggested that the trade union of-*

ficials and organizers were at liberty to seek the membership of his employees by talking to them on the premises (Rec. p. 4). *It further affirmatively appears that the organizers did talk to the employees and that the employees refused to join the trade union* (Rec pps. 4 and 8). *Thereupon the union organizers insisted that the employer enter into an agreement with them and either compel the then employees to join the union or discharge them and employ union members* (Rec. pps. 3, 4 and 5). Upon refusal of the employees to join the union and the employer to enter into a closed shop agreement with the union by which he would have to discharge all of his present employees if demanded by the union, and on April 30, 1937, a strike was called and picketing commenced. The pickets were total strangers to both the employer and employees (Rec. p. 5), never having been employed by the employer at any time previous thereto; nor were the pickets expectant employees (Rec. p. 5). None of the employees then employed by the employer-plaintiff went out on strike (Rec. pps. 5 and 6). These pickets carried banners upon which the following legend appeared: "This beauty shop is unfair to organized labor, Hairdressers & Cosmetologists Union Local 548D, American Federation of Labor and Chicago Federation of Labor" (Rec. p. 5). From these legends it appeared that the American Federation of Labor and the Chicago Federation of Labor were taking part in the campaign. In addition thereto, the complaint alleged (Rec. p. 2) that the Hairdressers & Cosmetologists Union held a charter from the Journeymen Barbers International Union; that some of the officials who called upon the employer were officers of said Barbers Union, and that in turn the Barbers International Union held a charter from the American Federation of Labor. It is charged and asserted in the complaint (and the other facts and reasonable inferences drawn from the facts and circumstances as pleaded, and the Supreme Court of Illinois

so found) that these legends were untrue and deliberately libelous, and that the continuous carrying of them established malice and a deliberate attempt to injure the plaintiffs, and therefore constituted a continuing and continuous libel and trespasses.

In addition to the foregoing activities, it is further charged and asserted that a secondary boycott was being maintained, aided and abetted by the defendant trade unions, in that without reason or excuse and immediately after the picketing commenced, the hot water supply which had been constant prior thereto was cut off, (Rec. p. 11); and that the supply of towels delivered by union drivers working for laundry companies was suddenly cut off after the strike started (Rec. p. 12). It further appears from the complaint that two customers were threatened with bodily injury by the pickets (Rec. p. 6).

The Supreme Court of Illinois, in affirming the judgment and opinion of the Appellate Court (Rec. p. 24) declared:

(1). That the ultimate objective of the trade union defendants was not made lawful by the Illinois Anti-Injunction Act; that the Illinois Act as construed by the Supreme Court in the case of *Meadowmoor Dairies* v. *Milk Wagon Drivers Union*, 371 Ill. 377, was limited in its restrictive provisions to controversies wherein present employees were, either by themselves or through their trade union representatives, contesting with the employer in connection with wages, hours and working conditions; that this construction of the Anti-Injunction Act was supported by the decisions and opinions of this Court in construing Section 20 of the Clayton Act (of which the Illinois Act was a prototype) and in the cases of *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, and *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 184. It was accordingly stated by the Supreme Court of Illinois that based upon the substantive law of the State of Illinois as declared by that

ıd over a period of many years, the ultimate objec-
the trade union defendants in the case at bar was
ıl. The ultimate objective being unlawful, that
aid that it necessarily follows that all the means
attain such unlawful objective are also unlawful
ıld be properly enjoined.

That the liberty of freedom of speech contended
a claim to unbridled license; that it appearing that
ıstitutional rights came into play and conflict in the
was the duty of the court to balance these rights so
ecognize both and keep one from destroying the
and that to sustain the defendants' claims would
in an unlawful destruction of the rights of both the
er and the employees. In the case at bar it clearly
ed that the defendants were guilty of libel and were
to be permitted to continue libeling the plaintiffs,
at therefore the means in and of themselves were
ul and constituted force and were properly enjoined.

That it appearing that the defendants were guilty
y of libel but of threats and maintaining a secondary
, that a court of equity should not be required to
ıd choose, and that the whole scheme was unlawful
uld be enjoined as such.

final decree as entered enjoins and restrains the
ants and persons associated with them from aiding,
g, assisting or participating in doing the things for-
Causes (a) and (b) (Rec. p. 38) enjoins and
ns picketing in front of the place of business and
ing or congregating in front of or in the vicinity of
siness in furtherance of picketing.

e restraining provisions are consistent with the find-
the Illinois courts that the ultimate objective of the
ants' strike campaign was unlawful under the com-
w of the State of Illinois; that the construction
by the Illinois courts upon the Anti-Injunction Act

of Illinois of 1925, to the effect that this Act applied solely to contests in which the then employees of a plant were taking part, and that such act, properly construed, could not apply to "class wars." It will be recalled that the Illinois Act is a prototype of Section 20 of the Clayton Act of Congress. (See *Ossey* v. *Retail Clerks Union*, 326 Ill. 405, and *Fenske Bros.* v. *Upholsterers Union*, 358 Ill. 239); and that this Court in construing Section 20 of the Clayton Act declared that its restrictive provisions applied solely to immediate employer and employee relationships and to contests in which either present or expectant employees took part. (See *Duplex Printing Co.* v. *Deering*, 254 U. S. 443; *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 184, and *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229). The court of last resort—the Supreme Court of Illinois—in the case of *Meadowmoor Dairies* v. *Milk Wagon Drivers Union*, 371 Ill. 377, in enunciating this principle, therefore properly concluded that the ultimate objective in such cases being unlawful, the injury which followed as a matter of course from the campaign cannot be said to be *damnum absque injuria*. If, therefore, the ultimate purpose sought to be attained is unlawful, then it also necessarily follows that the means used to accomplish the objective are equally unlawful and are overt acts in furtherance of an unlawful conspiracy to damage and destroy.

Clause (c) enjoins and restrains the exhibiting or causing to be exhibited any sign or placard or other matter *in front of or in the vicinity of plaintiff's business, designating the plaintiff's business as being nonunion or unfair to organized labor, or as refusing to permit collective bargaining, or designed to induce or influence persons not to enter plaintiff's place of business.*

A mere reading of this clause (c) indicates that it prohibits the carrying of banners only in front of or in the

nity of plaintiff's business, and then only such banners
ch designate the business as being unfair to organized
or or as refusing to permit collective bargaining de-
ied, exhibited and carried for the purpose of inducing
nfluencing persons not to do business with the plaintiff.
s clause neither in and of itself nor read in connec-
with clauses (a) and (b) prohibits the carrying of
ners or the disseminating of information anywhere else
he community other than in front of or in the vicinity
he place of business. Standing alone it merely enjoins
restrains, what the complaint charged and the decree
nd to be, an accomplished and continuing libel, and could
perly be restrained under the common law of the state
an accomplished and continuing trespass. This pro-
on of the decree does not prohibit the defendants from
ing any statements, either presently or in the future,
anywhere else in the community as to the truth of the
est between the trade unions and the employees or the
loyer. It does not prohibit them from saying that the
loyees refused to join the union and that the employer
sed to sign the contract because his employees refused
oin the union. This clause, even considering all other
raining clauses of the injunctional decree as being a
thereof, does not prohibit the trade union from picket-
or patrolling in front of either the employer's or the
loyees' homes; and permits the carrying of banners,
sing of the truth; nor does it prohibit the trade union
n advertising the truth in the newspapers or over the
o. The Chicago Federation of Labor, which is one of
defendants in the case, maintains and operates a large
o station in the City of Chicago, bearing the call letters
FL; the dissemination of trade union propaganda over
radio has been upheld by the Illinois Appellate Court.
Leitzman v. *Radio Broadcasting Station*, 282 Ill. App.
) Both the American Federation of Labor and the Chi-
Federation of Labor publish newspapers which are

circulated throughout the City of Chicago. Nothing in this decree prevents them from making any truthful statements as to the plaintiffs, both the employer and the employees, in their newspaper columns.

Clause (d) (Rec. p. 38) prohibits the defendants from "soliciting, inducing or attempting to induce or influence persons, employees or prospective employees of plaintiff *not to enter his place of business or do business with him.*" Neither this clause nor any other provision of the injunctional decree restrains and prohibits the defendants from obtaining membership applications from either the present employees or from prospective employees of the plant or from any other persons employed or about to be employed in the industry. Nothing therein prohibits or prevents the union from holding meetings anywhere other than in front of the place of business, and for the purpose of obtaining members. All that clause (d) prohibits is the maintaining of a primary boycott against the plaintiffs, to-wit: soliciting or inducing people not to enter the place of business or do business with the employer; the defendants are not enjoined and restrained from calling at the homes of the present employees and there seeking by any method short of threats or intimidation to obtain membership in the trade union.

Clauses (e), (f) and (g) (Rec. p. 38) restrain violence, threats, etc. Certainly the defendants cannot and they do not here complain of these restraints; neither do the defendants complain here of the construction placed upon the Anti-Injunction Act of 1925 by the Illinois courts. Their sole complaint is addressed to the declaration of common law appearing in the opinion of the Supreme Court of Illinois.

SUMMARY OF ARGUMENT.

I.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT CONFER AN ABSOLUTE RIGHT TO STRIKE.

Gompers v. *Buck Stove & Range Co.*, 221 U. S. 418.

Schenck v. *U. S.*, 249 U. S. 47.

Truax v. *Corrigan*, 257 U. S. 312.

Fiske v. *Kansas*, 274 U. S. 380.

Dorchy v. *Kansas*, 272 U. S. 306.

Stromberg v. *California*, 283 U. S. 359.

Near v. *Minnesota*, 283 U. S. 697.

Grosjean v. *American Press Co.*, 297 U. S. 233.

National Labor Relation Board v. *Jones & Laughlin*, 301 U. S. 1.

Senn v. *Tile Layers Union*, 301 U. S. 468.

Lovell v. *Griffin*, 303 U. S. 444.

Hague v. *C. I. O.*, 307 U. S. 518.

Thornhill v. *Alabama*, 310 U. S. 88.

Cantwell v. *Connecticut*, 310 U. S. 296.

Sec. 2a, Chap. 48, Ill. Rev. Stat. 1939.

Norris-LaGuardia Act, Sec. 102, Chap. 6, 29 U. S. C. A.

National Labor Relations Act, Sec. 151, Chap. 7, 29 U. S. C. A.

(a) The Fourteenth Amendment does not operate as a restraint upon the inherent power of the state to regulate and control the social and economic destiny of its citizens. Labor disputes involve internal, social and economic problems of the state; (except where the power to regulate or control is granted to the federal government by the Constitution of the United States, either by direct grant or as an incident to the exercise of granted power).

Schechter Corp. v. *U. S.*, 295 U. S. 495.
Carter v. *Carter Coal Co.*, 298 U. S. 238.
Senn v. *Tile Layers Union*, 301 U. S. 468.
Lauf v. *Shinners*, 303 U. S. 323.

(b) Assuming that the judgment of a state court, enunciating the common law of the state, can be considered as a declaration of state policy and analogous to a state statute, the declaration of policy in this case is not an unreasonable or arbitrary exercise of state sovereignty.

Nebbia v. *New York*, 291 U. S. 502.
West Coast Hotel Co. v. *Parrish*, 300 U. S. 379.
National Labor Relations Board v. *Jones & Laughlin*, 301 U. S. 1.
Minersville School District v. *Gobitis*, 310 U. S. 586.
Sec. 15; 198-215, Chap. 48 Ill. Rev. Stat. 1939.

(c) The objective sought to be attained by the trade union having been declared to be unlawful, the means used —the strike campaign, the picketing and patrolling—are necessarily unlawful as being a part of a conspiracy to damage and injure and in aid of an unlawful objective.

Aikens v. *Wisconsin*, 195 U. S. 194.
American Steel Foundries v. *Tri-City Council*, 257 U. S. 184.

Dorchy v. *Kansas*, 272 U. S. 306.
Meadowmoor Dairies v. *Milk Wagon Drivers Union*, 371 Ill. 377.
Frankfurter & Greene, "The Labor Injunction," p. 25.

(d) The due process clause does not grant an unbridled license to speak. The liberty of freedom of speech as declared by the First Amendment is not absolute. It is always subject to the exercise of governmental regulation and control in the interest of public welfare. This is emphasized by the due process clause of the Fourteenth Amendment which by its very language recognizes the power of the state to deprive citizens of liberty and property, and even life, if done in the reasonable exercise of police power.

Senn v. *Tile Layers Union*, 301 U. S. 468.
Meadowmoor Dairies v. *Milk Wagon Drivers Union*, 371 Ill. 377.

(e) This case involves private parties; each side is seeking to further its own economic well being and is distinguishable from an attempt on the part of the state to pass and enforce penal laws. The clear and present danger rule should not be the test.

Abrams v. *U. S.*, 250 U. S. 616.
Near v. *Minnesota*, 283 U. S. 697.

II.

THE LIBERTY OF FREEDOM OF SPEECH AS EXPRESSED IN THE FIRST AMENDMENT OFFERS FREEDOM ONLY TO THE SPEAKING OF THE TRUTH. THERE IS NO CONSTITUTIONAL PROTECTION OF SPEAKING OR PUBLISHING FALSEHOODS, SLANDER AND LIBEL.

First Amendment to the Constitution of the United States.

Fourteenth Amendment to the Constitution of the United States.

Near v. *Minnesota,* 283 U. S. 697.

Palko v. *Connecticut,* 302 U. S. 319.

Minersville School District v. *Gobitis,* 310 U. S. 586,

Thornhill v. *Alabama,* 310 U. S. 88.

Schofield, "Freedom of the Press in U. S." 9 Proc. American Sociol. Soc.

"Letters and Writings of James Madison," Vol. 4, p. 542.

(a) Court judgments and decrees cannot be said to place previous restraints on publishing and speaking.

Near v. *Minnesota,* 283 U. S. 697.

(b) This Court has said that the freedom of speech guarantees of the First Amendment are fundamental and have become part of the Fourteenth Amendment protection of liberty, by a process of absorption. The First Amendment by its very language restrains only the "Congress of the United States." The absorptive process cannot be construed as enlarging the scope of the liberty.

First Amendment to the Constitution of the United States.

Palko v. *Connecticut,* 302 U. S. 319.

Thornhill v. *Alabama*, 310 U. S. 88.

Minersville School District v. *Gobitis*, 310 U. S. 586.

Mott, "Due Process of Law," 1925 Ed., p. 276.

Payne, "The Constitution of the United States," p. 45.

Warren, "The New Liberty under the Fourteenth Amendment," 39 Harv. Law. Rev., p. 431.

III.

THE FOURTEENTH AMENDMENT GUARANTEE OF PROTECTION OF FREEDOM OF SPEECH DOES NOT PROTECT THE USE OF FORCE.

Aikens v. *Wisconsin*, 195 U. S. 194.

Gompers v. *Buck Stove & Range Co.*, 221 U. S. 418.

Near v. *Minnesota*, 283 U. S. 679.

Senn v. *Tile Layers Union*, 301 U. S. 468.

Thornhill v. *Alabama*, 310 U. S. 88.

Meadowmoor Dairies v. *Milk Wagon Drivers Union*, 371 Ill. 377.

Charles O. Gregory, "Peaceful Picketing and Freedom of Speech," American Bar Journal Issue, Sept., 1940.

(a) The finding of the state court as expressed in an opinion of the Supreme Court of Illinois that the facts of the case bespeak of an accomplished and continuing trespass, viz: libelous legends appearing on the banners, threats and intimidation, is binding on this Court. The further statement of law, to-wit: that the courts of equity will not pick and choose but will enjoin the whole scheme, is equally binding. Therefore, defendants' conduct epitomizes force

and is not protected by the due process clause of the Fourteenth Amendment.

Meadowmoor Dairies v. *Milk Wagon Drivers Union*, 371 Ill. 377.
Senn v. *Tile Layers Union*, 301 U. S. 468.
Lauf v. *Shinners*, 303 U. S. 323.

(b) The Fourteenth Amendment does not undertake to control the power of the state to determine by what process legal rights may be ascertained or what remedies should be provided to protect and enforce such legal rights. It offers protection only to the end that the litigants are afforded reasonable notice and a fair opportunity to be heard in the courts of the state.

Honeyman v. *Hanan*, 302 U. S. 575.

CONCLUSION.

Truax v. *Corrigan*, 257 U. S. 344.

ARGUMENT.

I.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT CONFER AN ABSOLUTE RIGHT TO STRIKE.

Although there may be some inferences drawn from the argument made by the defendants in their brief to the effect that they are contending for the absolute right to conduct a strike campaign by picketing, etc., and that such absolute right is protected by the due process clause of the Fourteenth Amendment, we cannot believe that they seriously contend that the Fourteenth Amendment confers such absolute right. (*Dorchy* v. *Kansas*, 272 U. S. 306.) It has always been said by this Court that the right to carry on business, be it called liberty or property, is entitled to protection by the Constitution of the United States. Accordingly, this Court has said that interference with this liberty or property right without just cause is unlawful. (*Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418; *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 184; *Truax* v. *Corrigan*, 257 U. S. 312; *Dorchy* v. *Kansas*, 272 U. S. 306.)

The complaint was filed in the *nisi prius* court of the state by an employer, together with all of his sixteen employees as plaintiffs. This complaint bespeaks of an attack made by the defendant trade unions and their officials, with the immediate objective of forcing and compelling the employees to join the trade union. It will be recalled that the trade unions first approached the employer with

the request that he enter into a closed shop agreement. This he agreed to do, providing his employees (not one of whom was a member of the union) would become members of the particular trade union. At his suggestion, the trade union organizers urged their cause to all of the employees and on the business premises. When the employees and each and every one of them refused to join the union and after the trade union insisted that, in spite of their refusal, he sign a closed shop agreement and employ none but union members, and if his employees persisted in their refusal to become members, that he discharge them, then and then only did the employer refuse to enter into contractual relationship with the trade unions (Rec. p. 4). This statement of fact is made not only by the employer but is confirmed by the employees (Rec. p. 8). Immediately thereafter a strike was called and the trade unions commenced picketing the business premises. All of the employees continued to work; the entire picket line was composed of strangers to the employer and employees—none of them were either past or expectant employees—certainly not one of them was a present employee. In addition to the patrolling, the pickets carried banners upon which legends appeared, falsely charging the employer with being unfair to the cause of union labor and to the defendant trade unions; and further charging him with refusal to permit collective bargaining (Rec. p. 5). On May 15, 1937, two customers who had had work done in the beauty shop were accosted and threatened by the pickets (Rec. p. 6). The pickets and union sympathizers congregated in front of the premises and made ingress and egress difficult (Rec. p. 7). A secondary boycott was being maintained, aided and abetted by the defendants, in that the hot water supply needed in the business, which was always available and constant prior to the date of the picketing, was suddenly greatly diminished and at times completely stopped (Rec. p. 11);

towel supplies which were always amply furnished by a laundry company prior to the date of picketing were cut down and became inadequate. The drivers of the laundry trucks were members of a trade union (Rec. p. 12).

Thus this record bespeaks of an immediate objective directed against the employees. Pressure was brought on the employer to force him to compel the employees to join the trade union or discharge them. Suffice it to say, however, that the immediate objective of the strike was to attack the employer and through the employer to force his employees to join the trade union. Of course, we do not lose sight of the fact that if, as a result of the pressure, this objective was attained, the next move and objective would have been to demand a closed shop agreement. Inasmuch as the employer in the first instance evinced a willingness to sign such an agreement, it necessarily follows that if the immediate objective was successful and attained, there would have been no further necessity for the strike campaign.

This attack upon the employees defies what we believe to be the basic American concept of collective bargaining. It must be conceded that this right is based upon the precept that the employees, individually and collectively, are entitled to freedom of action—the free choice to designate agents and representatives to bargain for them and with the employer—the legal right of the individual, freely and without restraint of any kind, either from the employer or from the trade union to designate the trade union as his bargaining agent. If it is morally wrong and violative of the constitutional concept of freedom of action for the employer to bring pressure on the employees, to the end that the employee should be free to determine whether or not he would become a member of a trade union, it is equally immoral and undemocratic for the trade union to exercise force and pressure to compel the employees to join the trade union,

or a particular trade union. We respectfully submit that the American concept has always been the watchword, "free choice by the employee." This is best epitomized by the policy declared by the Federal Congress in both the Norris-LaGuardia Act of 1934 and the National Labor Relations Act of 1935.* Several of the states passed legislation similar and sometimes containing identical language as appears in the Norris-LaGuardia Act, including the statement of policy. The Labor Relations Act of the State of Wisconsin containing this statement of policy was declared not to be violative of the Fourteenth Amendment by this Court in *Senn* v. *Tile Layers Union*, 301 U. S. 468.

Consistent with this basic precept of "free choice" on the part of the employees, the Illinois legislature passed the act commonly known as the Anti-Injunction Act of 1925 (Sec. 2a, Chap. 48, Ill. Rev. Stat. 1939). While this act by its language addressed itself to a restraint upon the jurisdiction of the chancery courts of Illinois, it was

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* Section 102, Chap. 6, 29 USCA (Norris-LaGuardia Act).

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, *the individual unorganized worker is commonly helpless to exercise actual ability of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives, of his own choosing,* to negotiate the terms and conditions of *his* employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives

ared by the Illinois Supreme Court that the effect of language was to make lawful the peaceable activities picketing, patrolling, etc., when done or participated by present employees. (*Fenske Bros.* v. *Upholsterers on,* 358 Ill. 239). When the trade union involved in case of *Meadowmoor Dairies* v. *Milk Wagon Drivers' on,* 371 Ill. 377, and also in the case at bar, sought pro- ion of the Anti-Injunction Act in campaigns directed narily against the employees, to compel them to join le unions, then the Illinois courts in recognition of the ept of "freedom of choice," refused to construe the i-Injunction Act as applying to such objectives. This aration of substantive law was not only consistent the common law of the state, as it had been enunciated hat court over a period of many years, but was also istent with the opinions of this Court in construing ion 20 of the Clayton Act of Congress of 1914. For Court said that Section 20 of the Clayton Act, prop- construed, confined itself to trade disputes in which

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n self-organization or in other concerted activities for purpose of collective bargaining or other mutual aid protection; therefore, the following definitions of, and ted upon, the jurisdiction and authority of the courts he United States are hereby enacted.

ec. 151, Chap. 7, 29 USCA (National Labor Relations Act).

* * It is hereby declared to be the policy of the United es to eliminate the causes of certain substantial ob- ctions to the free flow of commerce and to mitigate and inate these obstructions when they have occurred by ouraging the practice and procedure of collective bar- ing and *by protecting the exercise of workers of full dom of association, self-organization, and designation epresentatives of their own choosing,* for the purpose egotiating the terms and conditions of their employment ther mutual aid or protection.

See also Gregory, "Peaceful Picketing and Freedom of Speech," American Bar Journal (Sept. 1940) p. 709.

the employees, present and expectant, took part, and not to what this Court called "class wars." (*Duplex Printing Co.* v. *Deering*, 254 U. S. 443.) It is also recalled that the Illinois Anti-Injunction Act was declared by the Supreme Court of Illinois to be a prototype of Section 20 of the Clayton Act. (*Fenske Bros.* v. *Upholsterers Union*, 358 Ill. 239 and *Ossey* v. *Retail Clerks Union*, 326 Ill. 405.) In protecting a "free choice," the Illinois courts have invoked this doctrine of "free choice" where the trade union, as well as the employer, was attacked. (See *Kemp* v. *Railway Workers Union*, 255 Ill. 213; *Carlson* v. *Carpenter Contractors Ass'n.*, 305 Ill. 331; *Carpenters Union* v. *Citizens Committee*, 333 Ill. 225.) Competitors in business were also protected from pressure brought, other than in the usual and accepted competitive practices. (See *Meadowmoor Dairies* v. *Milk Wagon Drivers Union*, 371 Ill. 377 and cases cited therein.)

After the Anti-Injunction Act was passed by the Illinois legislature in 1925 and after the decisions of this Court in the case of *Duplex Printing Co.* v. *Deering*, 254 U. S. 443; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, and *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 184, and at about the time that the Norris-LaGuardia Act was before the Federal Congress, a concentrated effort was made by the trade unions to amend or add to the Anti-Injunction Act of 1925. The legislature was asked to pass legislation so that trade union activities similar to the campaign in the case at bar would be declared lawful. Ever since 1933 and at each of the four regular sessions of the Illinois legislature held since said date—in 1933, 1935, 1937 and 1939—bills were introduced in our legislature which provided accordingly. Not one of these bills was passed by the legislature.

The issue before this Court involves solely a problem over which the State inherently has control; for this Court

has always said that labor problems involve the social and economic life and destiny of the people of the States and are wholly state problems. (*American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184; *Traux* v. *Corrigan,* 257 U. S. 312; *National Labor Relations Board* v. *Jones & Laughlin,* 301 U. S. 1; *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *Schechter Corp.* v. *U. S.,* 295 U. S. 495; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379.) Accordingly, it has been said by this Court that unless labor problems arise as an incident to the carrying out of powers granted to the federal government by the Federal Constitution, the problem is a state problem, and that neither the Federal Congress nor the Federal courts can interfere with a reasonable exercise of this state police power. (See *Schechter Corp.* v. *U. S.,* 295 U. S. 495; *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *Lauf* v. *Shinner,* 303 U. S. 323.)

It must be conceded that the employer and all of his employees here were engaged in intrastate business and not interstate commerce. They were rendering beauty services to the women of the community in which the place of business was located and in the City of Chicago. (See *Schechter Corp.* v. *U. S.,* 295 U. S. 495, and *Carter* v. *Carter Coal Co.,* 298 U. S. 238.)

The declaration of substantive law by the Supreme Court of Illinois is binding upon this Court The only question before this Court is whether or no this common law of the State of Illinois is violative of constitutional protection under the restrictive clauses of the Fourteenth Amendment to the United States Constitution (*Senn* v. *Tile Layers Union,* 301 U. S. 468; *Lauf* v. *Shinner,* 303 U. S. 323.)

The defendants contend that the injunctional order must be examined in the same light as if the decree of the Supreme Court of Illinois was a legislative enactment. They contend that this decree on its face is void. They

assert that, on its face, it defies the due process clause of the Fourteenth Amendment and they say that this Court has already committed itself in *Senn* v. *Tile Layer's Union*, 301 U. S. 468. They quote from the opinion (p. 478) wherein in substance it is said that the members of a trade union may, without statutory authority granted by the State, publicize the facts of a labor dispute because freedom of speech is guaranteed by the Federal Constitution. They disregard the sentence immediately following, to the effect that the State has the police power right to regulate the method and means of publicity, as well as the use of the public streets. They have further overlooked the succeeding sentence wherein this Court definitely indicates that the question of constitutional protection of the means used—the picketing, etc.—is dependent upon whether or not the end sought to be attained in a particular strike is lawful.

The liberty of freedom of speech, either under the First or Fourteenth Amendment, has never been said to be absolute, but is always subject to some regulation and control in the interest of public welfare.

While we cannot perceive how, under the federal system, a judgment or decree of a State court can be considered as a declaration of policy distinguished from an interpretation of policy already declared; and therefore upon what basis the Fourteenth Amendment use of the word "state" can be construed to include judgments of a State court in its enunciation of the common law of a State, yet for the moment we assume that this judgment is analogous to a State statute. This Court is not concerned with whether or not a State statute on its face or as construed and applied declares a policy different from the policy declared by the Federal Congress or by the Legislatures of other States. While a variant in policy in the same State is to be considered, yet that in and of itself

is not sufficient to impel this Court to declare state legislation unconstitutional.

The issues involved here are matters which *per se* concern state internal and economic policy. The Fourteenth Amendment does not *per se* deny to the States the right or power to pass legislation dealing and treating with labor problems. The question resolves itself as to whether or not this decree on its face is so unreasonable and arbitrary that judgment must be rendered here declaring the policy to be defiant of the "due process" clause of the Fourteenth Amendment.

Defendants complain in their brief that the policy enunciated by the decree varies from State policy in cases wherein employees are involved in the controversy. They say that such variant is not only unjustifiable, but that it is contrary to the due process clause protection of freedom of speech. We have heretofore suggested that one of the fundamental precepts of the recognition of trade unionism is that it permits and offers "freedom of choice" to the employee to designate some one to bargain for him; that by recognizing the right of a group of employees to collectively appoint one bargaining agent, their rightful position in their economic destiny is preserved.

It will be recalled that all of the courts, including this Court, for many years recognized that the employer had the legal right to bring pressure to bear on the employees to sign what the trade unions termed "the yellow dog contract." State legislation was passed in several States, including Illinois, which made it a crime to induce or assist in the violation of these so-called "yellow dog contracts." As a result of the general condemnation of these contracts, public opinion forced a change in the underlying philosophy. The result is that the Federal Congress and most of the legislatures of the States including Illinois, passed acts declaring such contracts illegal

and void. In Illinois, and in 1933, it was declared by legislation that such contracts were contrary to the public policy of the State and wholly void and unenforcible in the courts of the State. (Sec. 2(b), Chap. 48, Ill. Rev. Stat. 1939). The basis of complaint, as is well known, was that the "yellow dog contract" was a denial to the employee of his constitutional right of "freedom of choice" —that he should not be denied the right to join a trade union if he were of the opinion that his own interests would be best served by so doing. Is compulsion and pressure brought by a trade union for the purpose of compelling the employee to join the trade union to be placed upon a different pedestal? Does this not also deny "freedom of choice" even as the "yellow dog contract"? Should not the employee have the free right to determine for himself whether he wishes to join a trade union or a particular trade union? It will be recalled that in the case at bar the employees refused to join the particular trade union, and gave their reasons therefor. The complaint so states in detail. We recognize that in weighing the needs of society, employees under certain circumstances may be forced to join a trade union or to participate in their activities. But we submit that that is a question of state policy and that the state has the sole right to determine whether or not the welfare of the state will be best served by permitting or refusing to permit general unionization of employees as a class. If trade union force and pressure is to be held lawful and constitutionally protected by this Court and in this case; then we submit that it necessarily follows as the next step that the trade union would have the lawful right to come into the community and say that the trade union deems it for the best interest of the employees of the entire community that each and every one of them should belong to the particular union, and if there is a refusal, to conduct the strike campaign against each and every one of the industrial plants of the com-

nunity and industry as a whole and at the same time. If uch a program is truly for the best interests of the com-nunity, we say that the policy should not be one which omes from the courts, but, as said by this Court in *Miners-ille School District* v. *Gobitis,* 310 U. S. 586:

> "To fight out the wise use of legislative authority in the form of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serve to vindicate the self-confidence of a free people * * *."

If what we have heretofore said does not satisfy the re-uirements of due process, then we say that the statements f this Court found in the opinion of *Senn* v. *Tile Layers Union,* 301 U. S. 468, indicate that this declaration of pol-cy is not unconstitutional. If a State has the constitutional ower to permit a trade union to compel an employer to ease working with his own hands by the strike campaign, hen we say that a state statute which protects the em-loyee and employer from pressure by a stranger union s equally constitutional.

In late years this Court has declared that it is most eluctant to declare State legislation unconstitutional on ts face and without having before it the facts, the contem-orary conditions, social and economic, which impelled the egislature to pass the law. (*Nebbia* v. *New York,* 291 U. S. 02; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; dis-enting opinion of Mr. Justice Brandeis in *Truax* v. *Corri-an,* 257 U. S. 312). This Court has also said that the urden of establishing unconstitutionality is upon him who ttacks; that it is the province and duty of this Court to ave rather than destroy. (*National Labor Relations Board* v. *Jones & Laughlin,* 301 U. S. 1). Defendants have ot attempted to maintain this burden, but to the contrary ssert that judgment should be passed by mere examination

of the decree on its face. While we may rightfully accept this challenge, yet we feel impelled to give to the Court some statistics and factors which we believe enter into the picture.

The History.

The history of the struggle is a matter of common knowledge. Mr. Justice Brandeis, in the dissenting opinion in *Truax* v. *Corrigan*, 257 U. S. 312, beginning at p. 354, gives this history in detail and down to 1921. It will be recalled that Section 20 of the Clayton Act was heralded by the trade unions as being "Labor's Magna Charta." It was thought by the trade unions that Section 20 gave them the green light and that by reason thereof they could compel general unionization of industry. When this Court limited the application of Section 20 to conflicts in which the employees were participants, and not to "class wars," then this Court was accused of throttling the trade union movement by what was termed "judicial legislation." The result was that the State courts following the lead of this Court refused to construe their prototype acts as authorizing general unionization campaigns. In 1932 Federal Congress passed the Norris-LaGuardia Act under which the words "labor disputes" were defined as permitting trade union campaigns and activities, regardless of whether or not the employees of a plant were members of a trade union. By the end of 1939, thirteen States, including Illinois, had passed laws similar to the Clayton Act.[1] Fourteen States (most of which had originally enacted the Clayton Act) enlarged the scope of permissive trade union activities by passing legislation similar to the Norris-LaGuardia Act of 1932.[2] The remaining twenty-one States

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[1] CLAYTON ACT STATES:
Arizona, California, Illinois, Kansas, Maine, Montana, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, Wisconsin, Wyoming.

continued to deal and treat with the problems on the basis of their substantive law.

The legislative policy of the State of Wisconsin has always been considered favorable to the trade union movement; likewise the State of Oregan was said to be liberally disposed. In both of these States enactments similar to the Norris-LaGuardia Act were passed almost immediately after the Federal Congress enacted its Norris-LaGuardia Act. The courts of these States, as is evidenced by the decision of the Supreme Court of Wisconsin, quoted from in the case of *Senn* v. *Tile Layers' Union,* 301 U. S. 468, sustained the trade union activities, and made no attempt in any way to construe their acts so as to cut down these activities. However, in both States and in 1939, laws were passed which completely changed the picture. In Oregon, its law was passed by the legislature as the result of a referendum of the people. The people of the State, under their initiative and referendum section of the Constitution, demanded a change in the law. The result is that in Wisconsin and Oregon they now have statutes on their books which restrict trade union activities to the end that neither the liberal provisions of Section 20 of the Clayton Act nor of the Norris-LaGuardia Act are applied. No longer in Wisconsin and Oregon can the trade union call a strike if one or two employees are members of a trade union—certainly no strike can be called if no employee is a member of a union. A strike campaign is unlawful unless a *majority of the employees go out on strike and unless the strike is called concerning matters pertaining to wages, hours and working conditions of the employees directly involved in the controversy.* (Chap. 2, Laws of Oregon, 1939; Secs. 103-535, Wisconsin statutes of 1939).

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[2] Norris-LaGuardia Act States:
Colorado, Idaho, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, New York, North Dakota, Oregon, Pennsylvania, Utah, Washington, Wisconsin.

In Illinois, the Anti-Injunction Act which in effect mad lawful, peaceful picketing, patrolling and the carrying o banners, when done as part of a campaign in which some o the employees—no matter how few—are directly inte ested, was passed in 1925. Beginning with the bienni session of the legislature in 1933 and at each session o our legislature in 1935, 1937 and 1939, the trade union have brought about the introduction of bills under whic trade union activities were permitted to be expanded, as i the Norris-LaGuardia Act. Our legislature has refuse to pass the proposed legislation.[2a] The legislature of thi State was in session in 1939 at the time that the Suprem Court of Illinois rendered its opinion in the case of *Me dowmoor Dairies* v. *Milk Wagon Drivers Union*, 371 Il 377, and in the case at bar. An immediate effort was mad at that session to bring about the passage of a bill whic would make lawful the conduct and activities condemne by these decisions. The legislature again refused to pas such a bill.

Thus the history rightfully can be said to be an epitom of experience. If the people of the State of Oregon an within the last year demanded a change in the law whereb the right to strike was limited to (a) individual plant and solely to disputes concerning matters pertaining t wages, hours and working conditions of employees directl involved; and (b) only where a majority of the employee are out on strike; and if the legislature of Wisconsi deemed it necessary in that State to pass similar legisl tion; and if in the State of Illinois the legislature as late a 1939 and after the decision of its court of last resort in th case at bar, saw fit to refuse to pass the enlarging legisl

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[2a] Senate Bill 396, House Bill 598 (1933).
Senate Bill 98, House Bill 138 (1935).
Senate Bill 22, (1937).
House Bill 97 (1939).

tion asked for by the trade unions, then we believe we have the right to say that those charged with responsibility of declaring a policy have deemed it wise and necessary in the interest of their own citizens in two instances to restrict and limit, and in one instance to maintain the status quo.

From this history it is apparent that there is no unanimity of opinion amongst the States, and that insofar as the States are concerned they are still going through a period of trial and error.

Economic and Social Conditions.

Illinois is the third or fourth largest industrial community in the country; the City of Chicago is the second largest city in the United States. It is only natural that in a State containing such a large community, the economic and social problems are different than in the agricultural States. In and around the City of Chicago we have witnessed some of the most violent strikes. (See "Dynamite," by Louis Adamic, 1935). It is common knowledge throughout this country that building activities have been retarded in the City of Chicago, due largely to jurisdictional disputes between trade unions. The public press in the past few years has been full of articles pertaining to labor conditions in Chicago. (See "American Labor Struggles," by Samuel Yellen, 1936). The Chicago press and the press throughout the country has contained new items and articles charging that racketeers, gangsters and criminals have taken over control of some of the trade unions. See Thurman Arnold "Bottlenecks of Business," p. 243.

It must be recognized and conceded that, by virtue of the National Labor Relations Act (the Wagner Labor Act), the Wages and Hours Act of the Federal Congress, the decisions of this Court construing the first act, in *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, and in other cases,

by far and large the major part of persons gainfully employed in industry in the United States and the labor relations, between them and their employees, are governed, regulated and controlled by the foregoing Congressional legislation. Thus, labor relations in the main have been transferred from the States to the Federal government. The States have left to them the power to regulate and control only those labor activities which fall within what is today a narrowed definition of intrastate commerce—the business of the middleman,—the broker, the butcher, the grocer and the like. Thus, and as a result, more than 50% of all persons gainfully employed who are eligible to trade union membership are subject in their labor relations to the control of the Federal government. Of approximately 22,000,000 persons employed in the United States who are eligible for trade union membership under trade union by-laws (as shown by the last available statistics) 12,500,000 are engaged in interstate commerce; approximately 10,000,000 in intrastate endeavors.[3] According to the census of business found in the statistical abstract of the United States, based upon the census of 1930 (Census of Business 1935, Tables A and 3, Vol. 5) in 1935, there were approximately 8,000,000 persons engaged in domestic personal service and professional activities. According to Prof. Douglas in his article "The Iron Age," issue of April 6, 1939, there were, as of that date, approximately 1,300,000 persons engaged in business in the United States employing less than nine people. These perforce are the small business man and the operators of small establishments doing intrastate business. It is common knowledge that these employers, and certainly those in the personal ser-

[3] "Report of Executive Council A. F. of L. to the 57th Annual Convention," Denver, Colo. (Oct. 4, 1937) p. 10; Elsie Gluck, "Introduction to American Trade Unionism," 1937 Supp. Additional figures—C. R. Daugherty—"Labor Problems in American Industry," 1933, p. 499.

vice and professional activities, are able to exist only because they themselves do part of the work. It is also common knowledge that trade unions as a general rule, and by their by-laws, neither permit such employers to become trade union members, nor do they permit the owner to labor in a unionized plant.

By reason of the National Labor Relations Act and other similar legislation, the trade unions can, and do see to it that cases are brought or defended in courts of the United States. There, the Norris-LaGuardia Act and the restraints on equity jurisdiction and procedure provided for therein come into play. The trade unions, by reason of the definition of "labor dispute" found in the Norris-LaGuardia Act, have been able to conduct general unionization campaigns in the major part of the industrial plants of the country. This has been a boon to the expansion of trade union membership and trade union membership has grown by leaps and bounds throughout the country. A typical example is the following: the President of the United States, on September 11, 1940, in an address delivered before the convention of the International Brotherhood of Teamsters, (held in the City of Washington), made the statement that the membership of this union had grown from 70,000 in 1933 to 500,000 in 1940—an increase of over 700%. At the end of 1938, the five large national unions and their affiliates claimed a membership roll of 9,100,000, which represented approximately 41% of all gainfully employed people in the United States who were eligible to trade union membership.[4] Over a period of three years

[4] "Report of Executive Council A. F. of L., 58th Annual Convention," (Oct. 3, 1938) Houston, Texas; "Report of John L. Lewis to First Constitutional Convention of C.I.O." (Nov. 14, 1938) p. 11—covering a period from the Organization of the C.I.O. to November 1, 1938.

Woytinsky—"Labor in the United States," 1938, chart. p. 308-311. It will be noted that this chart is based upon

from 1934 to 1937 trade union membership in these five unions increased by 4,000,000; over a period of six years and from 1931 to 1937 the membership roll increased by approximately 6,000,000.[5] In 1931 the trade unions represented approximately 9% of the people gainfully employed

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the official "Report of the United States Census Bureau for the 1930 Census."

The figures quoted above are an estimate giving due regard to the fact that unemployment has increased since 1930. It will be noted that the chart cited shows that the total number of persons gainfully employed in the United States in 1930 was 48,829,920; whereas our figure for 1937 was 40,000,000. The latter figure is taken from an estimate made by Herbert Harris in his book, "American Labor," 1939, p. 359.

It is a matter of common knowledge that the number of persons employed in agriculture, professional work, domestic and service pursuits was greater in 1930 than in 1937. Therefore our percentage figures that follow represent an extremely conservative conclusion. Since these figures are estimates we attempt to be as conservative as possible.

[5] Harris, "American Labor," 1939, p. 359; Gluck, "Introduction to American Trade Unionism," 1937 Supp. p. 96. In October, 1937, total trade union membership was 7,750,000—Gluck op. cit. p. 96. Additional figures show:

Year	Total Persons Employed	Membership in Trade Unions	Percentage of Trade Union Members to Total Persons Employed
1897	26,000,000	447,000	1.4
1910	38,000,000	2,147,200	5.8
1920	42,000,000	5,110,800	12
1930	48,000,000	3,298,000	9
1934	40,000,000	5,000,000	12.5
1939 (Est.)	40,000,000	9,500,000	23

Harris, "American Labor," 1939, chart. p. 359.

It will be noted that the figures used to indicate the number of persons gainfully employed include those persons

and eligible to membership—so that over a period of six years and while industry was going through a depression and suffering tremendous losses, trade union membership increased by 32%.

It is common knowledge that membership dues in a large number of the local unions is in excess of $10.00 per year; in some instances the fees and assessments run in excess of hundreds of dollars per year. The exact income of trade unions from dues and assessments cannot be ascertained since their books and records are not subject to examination by any state, local or federal agencies. Therefore, their income is not generally known. Here and there articles in newspapers have appeared in which it is stated that the income of the trade unions is in excess of $1,000,000,000 per year. It is also common knowledge that it is not unusual practice for trade unions to have initiation fees which run in excess of hundreds of dollars per member.[6]

The annual report of the American Federation of Labor for the fiscal year ending August 31, 1937, published at its convention in that year, shows that its gross income was $1,185,000 for the preceding fiscal year; their balance sheet showed $586,500 cash on hand, of which $533,000 was set aside and allocated for defense purposes. For the fiscal year ending August 31, 1938, the published report showed a gross income of $1,800,000—an increase of $700,000 in cash income over the preceding fiscal year. It was reported that $1,175,000 was spent for organizational purposes; office expenses and loans were $166,800; $150,000 was spent

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engaged in agriculture, professions, domestic and service pursuits. If those persons not eligible to membership in trade unions were omitted from our calculations, it must be recognized that the percentage figures shown would be 41% for 1939.

[6] Prof. Paul H. Douglas, "International Labor Review," March, 1939.

in publishing and circulating its newspaper. This amount represented the cost and expense in excess of gross income.[7]

The Congress of Industrial Organization published a report in which it appears that during the three year period from 1933 to 1935, inclusive, its gross income was $3,500,000; that this total amount was spent during the three year period for organizational activities and purposes of one kind or another.[8]

At the end of 1936, the Brotherhood of Locomotive Firemen and Engineers published a balance sheet showing cash and liquid securities of approximately $25,000,000 on hand. On June 1, 1939, the United Mine Workers of America had $2,877,381.33 in cash and liquid securities on hand. Its income from June 1, 1939, to December 1, 1939, was $1,151,757.90. After deducting expenses and operating costs and on December 1, 1939, there was $2,526,750.49 in cash and liquid securities on hand.[9]

The business involved in the case at bar is known as the beauty shop business. Let us now look at the income figures for the beauty shop business, both in the entire United States and in the City of Chicago. In 1935 there were 61,355 beauty shops operating in the United States; they employed 78,000 people; the average gross annual income per establishment was $2800.00. There were approxi-

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[7] "Report of the Executive Council of A. F. of L." Denver, Colo. (Oct. 4, 1937) pp. 5-9; "Report of the Executive Council of A. F. of L." Houston, Texas, (Oct. 3, 1938). Report of Executive Council of A. F. of L. Convention, pp. 6 and 24 (Oct. 3, 1938) Houston, Texas.

[8] "Report of John L. Lewis to the First Constitutional Convention of C.I.O.," Pittsburgh, Pa. (Nov. 14, 1938) pp. 13, 14.

[9] Pamphlet prepared for the members of the Brotherhood of Locomotive Firemen & Engineers, 1937. Proceedings 36th Annual Convention United Mine Workers of America, Feb. 1, 1940.

mately 2322 beauty shops in Chicago in that year; the average gross annual income of the beauty shop operating in the City of Chicago was $3590.00.[10] These beauty shops were in the main operated by individual operators and were not chain operations.

The ability of the individual beauty shop operator to successfully combat trade union pressure and force is answered by the foregoing statistics.

It will be recalled that in the complaint the employees, all of whom are women, stated that they did not wish to join a trade union because they felt that they were amply protected by the legislation then in force and effect in the State, as to hours, wages and working conditions. They also said that theretofore they had been induced to become members of a local union and that not only did the union fail to offer them any benefits, but that the union remained in existence only a short time and its organizers and officials disappeared, taking with them the contents of the treasury, and they were never heard from since that time (Rec. p. 9).

The Illinois legislature has from time to time passed legislation fixing maximum hours of labor for women (Sec. 5, Chap. 48, Ill. Rev. Stat. 1939). A minimum wage for women is also fixed by the statute and working conditions are prescribed. (Secs. 198 to 215, Chap. 48, Ill. Rev. Stat. 1939.) It must also be presumed that the employees knew in a general way what was the gross income of their employer, and therefore what wage he could afford to pay.

In considering the problem, we must also take into consideration that in 1937 (according to the United States Bureau of Labor, Department of Labor Statistics, Bulletin No. 651, and 46 and 48 Monthly Labor Review) 70% of the strikes in the United States involved unionization campaigns

[10] U. S. Department of Commerce, Bureau of the Census, "Census of Business 1935," Vol. 2, p. 1, 1937.

and miscellaneous issues; 30% wages, hours and working conditions; 58% were strikes for plant or industrial organization. In 1938 72% of the strikes involved organization and miscellaneous issues; 28% wages, hours and working conditions. During the first two months of 1939, 55% of the strikes involved organization and 22% wages, hours and working conditions.

Thus we believe that we have the right to say that no longer is the trade union the weak and undernourished child in the family; no longer does he require the protecting arm of the mother to keep him from being overwhelmed by his brethren. He too has become strong and well able to take care of himself in the struggle for economic existence and well being. It appears to use that the battle should be fought out between the brothers in the family, and that public opinion should be left to determine the issues and problems. Certainly, a national policy which materially affects each and every of the forty-eight States should not be enunciated by a court. All in all considered, we respectfully submit that it has not been demonstrated in the case at bar that the trade union objective here can be constitutionally protected—the declaration of policy of the Illinois courts as evidenced by this decree cannot be said to be an unreasonable and arbitrary pronouncement of the public policy. It certainly must be said that the issue presented is one which resolves itself into a question of wisdom and matters over which this Court has often said it will not concern itself. (*Senn* v. *Tile Layers Union*, 301 U. S. 468.)

It always has been the universally accepted legal doctrine that the strike campaign itself, the picketing, the patrolling and the dissemination of information in a particular case can win immunity only from its purpose—the immediate objective. (See Frankfurter & Greene, "The Labor Injunction," p. 25, and cases cited; *Aikens* v. *Wisconsin*, 195 U. S. 194; *Dorchy* v. *Kansas*, 272 U. S. 306.) If it necessarily

follows that the means used are part of an entire campaign and cannot be separated therefrom, and if the purpose is unlawful, then the means—the campaign used—must be unlawful. *Damnum absque injuria* cannot be held to apply. (See *Meadowmoor Dairies* v. *Milk Wagon Drivers Union*, 371 Ill. 377.) Can it be said that the due process clause of the Fourteenth Amendment in protecting freedom of speech and freedom of the press should become a shield and a protection for those engaged in unlawful objectives? We believe not, and we submit that the freedom of speech guarantee can offer protection only where the end is lawful. (*Dorchy* v. *Kansas*, 272 U. S. 306.)

We concede that in this day and age, all civil liberties, and particularly freedom of speech and freedom of the press, must be fortified and strengthened as never before—even perhaps to the end of upholding these rights where they might completely destroy the property right, but we say—the liberty of freedom of speech and freedom of the press cannot be fortified if it is permitted to be used as a screen and a cover up for persons engaged in pursuing unlawful objectives.

We respectfully submit that in each of the cases involving freedom of speech and freedom of the press, decided by this Court since *Gitlow* v. *New York*, 268 U. S. 652, it clearly appears that the parties whose liberty of freedom of speech and freedom of the press were sought to be denied by the State or Congressional legislation, were seeking to protect this liberty in the exercise of lawful pursuits—furthering lawful objectives; or that the legislation attacked did not differentiate between unlawful and lawful objectives, and swept within its ambit and without differentiation, both lawful and unlawful pursuits; or that the reason given for punishing existing evils was not sufficient in the opinion of this Court to warrant a restraint upon the liberty. These cases in the main involve penal statutes making the means

used to accomplish ends, crimes. The pursuits of the defendants in these cases were either lawful *per se* and so recognized in the State, or they were made lawful by virtue of constitutional protection, or the record before this Court, either by silence or by demonstration, warranted the presumption that the objective was lawful by the law of the State.

Thus by the Constitution of the United States, each and every citizen has the inherent right to advocate by peaceful means a change in the form of government. It is only when the advocate seeks to espouse a change by encouraging or inciting force and revolution that the objective becomes unlawful. Therefore, this Court has said that legislation which, on its face, or as construed and applied to the facts of a particular case makes it a crime to advocate the overthrow of government by peaceful methods, creates an unconstitutional deprivation of the liberty of freedom of speech. This has been held and applied to both State and Federal statutes. (See *Schenck* v. *U. S.*, 249 U. S. 47; *Abrams* v. *U. S.*, 250 U. S. 616; *Stromberg* v. *California*, 283 U. S. 359; *Fiske* v. *Kansas*, 274 U. S. 380.)

State legislation which was aimed at putting out of business newspaper publishers who were presumably attacking public officials, by placing an exorbitant tax on circulation, was declared unconstitutional by this Court. It is clear that the tax defied the historical conception of placing previous restraints and was aimed at destroying a lawful business. (*Grosjean* v. *American Press Co.*, 297 U. S. 233.)

A state statute which permitted and authorized an injunctional order, under the theory of the abatement of a nuisance by permitting law enforcing officers to stop the publication of charges against public officials by putting the publisher out of business, also defied the historical conception of freedom of speech. (*Near* v. *Minnesota*, 283 U. S. 697.) In the cited case, the record did not disclose that

the charges were false, and it was properly asserted by this Court that a statute which permitted previous restraints on the publication of truth, and without the necessity of preliminary proof of falsehood, was clearly unconstitutional on its face. Persons engaged in an attempt to discuss the merits or demerits of public laws are certainly following lawful pursuits and basic rights protected by every Constitution in this land. Therefore, a statute which provides for a license, and provides that a public official shall pass judgment upon what may be said at meetings and in public halls, is clearly unconstitutional. (*Hague* v. *C. I. O.*, 307 U. S. 518.) Any legislation which requires the obtaining of a license before publishing or discussing religious practices and precepts interferes on its face with the free exercise of religion and creates a previous restraint, especially where the legislation does not seek to reach fraudulent practices and covers within its ambit lawful dissemination of information on religious subjects. (*Lovell* v. *Griffin*, 303 U. S. 444; *Cantwell* v. *Connecticut*, 310 U. S. 296.) All of the ordinances passed upon in the opinion of this Court in *Schneider* v. *State*, 308 U. S. 147, provided for previous restraints upon lawful pursuits, or at least the statute did not attempt to differentiate between lawful and unlawful objectives. The ordinance of the City of Milwaukee, on its face, did not attempt to control the dissemination of literature where the objective of the trade union was unlawful. The ordinance did not attempt to deal and treat with the subject in this respect, but it covered all distribution of literature on the streets of the City of Milwaukee. The reason given by the State in the record before this Court in defending this ordinance, was that the purpose of the ordinance was to prevent a littering of the streets. This Court was of the opinion that the liberty of freedom of speech required a more persuasive reason for denying the right of the trade unions to spread information with regard to a labor dispute. No challenge was made as to the objec-

tive of the trade union in the particular case. In the light of the right of this Court to weigh the circumstances and appraise the substantiality of the reasons advanced in support of the ordinance, this Court was of the opinion that the reasons advanced were not sufficient to warrant an abridgement of the liberty of freedom of speech.

In *Senn* v. *Tile Layers Union*, 301 U. S. 468, the objective of the trade union was made lawful by the statute of the State of Wisconsin, and declared constitutional by the Supreme Court of the State under its Constitution. This Court was of the opinion that the statute on its face and as construed and applied by the Supreme Court of the State, did not defy the due process clause of the Fourteenth Amendment. Therefore, the objective of the trade union as disclosed by the record before this Court was a lawful objective protected by a constitutional statute of the State. This Court and in its opinion in the case, clearly indicated that the end sought to be attained was lawful; that the means used were lawful, and therefore, unless the means used were of a violent and libelous nature that they were *per se* protected by the constitutional guarantee of freedom of speech.

It is apparent from a reading of the opinions of this Court in *Thornhill* v. *Alabama*, 310 U. S. 88, and *Carlson* v. *California*, 310 U. S. 106, that this Court is of the opinion that freedom of speech does not grant an unlimited and an all-embracing right to speak; that the State has the right in the exercise of its police power and within narrow limits to put restraints upon the liberty of freedom of speech in a proper case. It is true that the limits are made narrow, for this Court said in *Thornhill* v. *Alabama*, 310 U. S. 88:

> "* * * The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed

activity, the peaceful character of their endeavor, *the nature of their dispute with an employer,* or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute."

The statutes before the Court in *Thornhill* v. *Alabama,* 310 U. S. 88, and in *Carlson* v. *California,* 310 U. S. 106, on their face and as construed and applied by the State courts, and as disclosed by the record, made it a crime to engage in the lawful pursuit of a strike and perforce the statutes on their face and as construed and applied by the State, did not discriminate between those strikes in which the objective was lawful and those strikes in which the end was unlawful. These statutes were indefinite, and from both a literal reading and a construction placed thereon by the state courts, it clearly appears that the State legislators struck down what were peaceable and lawful means used in attaining lawful as well as unlawful objectives of a strike. All trade union activities were enjoined.

In the case at bar, the decree is narrow in its application and addresses itself solely to the campaign where the objective is unlawful. From other legislation in force and effect in the State, lawful objectives and means used to accomplish them could not be enjoined and restrained. (Sec. 2a, Chap. 48, Ill. Rev. Stat. 1939.)

The decree specifically and explicitly defines the unlawful objective. There can be no question about its language and no one able to read and understand the English language could possibly misconstrue or misinterpret. The punishment is aimed at an elimination of a substantive evil, found to be an evil by the State, and addresses itself solely to a prescribed, limited and declared evil.

We are not unmindful of the fact that this Court, in protecting the liberty of freedom of speech, has taken the

position that if there are two ways of punishing for an abuse of the liberty, one of which will amount to an abridgement of freedom of speech and the other which will not, the second method must be used. This is the argument which is made by the defendants here, but they offer no alternative method. The unlawful activities and campaign cannot be treated with in any other manner than as prescribed by the decree in order to deal and treat with the substantive evil sought to be eliminated. The decree deals with private rights; it recognizes that the attack is made by the trade union at the place at which it can do the most harm and stops the trade union activities at that place. At that place the trade union clearly interferes with (a) the right of the State to control the use of the public streets for the carrying on of lawful objectives (*Senn* v. *Tile Layers Union*, 301 U. S. 416); and (b) the squaring of rights and liberties belonging to the plaintiffs which are protected by the same sentence and section as the liberty of freedom of speech of the defendants is protected by the same constitutional amendment (the 14th Amendment). It must be presumed that the Court had before it and was acquainted with all of the facts and the contemporary economic, social and financial position and condition of the combatants. (This we have heretofore discussed and elaborated upon.)

Without further and extended argument in this regard, we respectfully submit that the punishment for the abuse of the liberty prescribed by the decree is the only method of punishment which can effectively treat with the evil and protect the rights and liberties of the plaintiffs. To say that the plaintiffs have open to it the same public channels, to-wit: the streets in front of the place of business to run counter picket lines or the public press and radio to espouse their cause, would only mean (a) that in fact and in practice, two picket lines would only result in increased congestion by additional crowding of the side-

walk and inevitably to strife and violence and would only have the immediate effect of assisting the trade union in bringing about the damage and destruction which its picket line seeks to do; and (b) that it would compel the plaintiffs to spend their money and await the education of the people and the assertion of public opinion, while their house is on fire and while they are being destroyed. We cannot shut our eyes to what everyone knows is the real object and purpose of a picket line. The picket line is not placed and maintained, in truth and in fact, for the purpose of educating the public. The real purpose and object is (1) by pressure on the customers to bring about a loss in patronage; (2) a cessation of work by putting fear into the hearts of the employees; (3) to find out who is working in the plant so that they can by other ways and means —by the use of the telephone, by talking to the relatives and friends—bring about the leaving of employment; and (4) to bring sufficient force and pressure on the employer and employees, so that they will break down and accede to the union requests and commands. See Gregory "Peaceful Picketing and Freedom of Speech" Amer. Bar Journ. (Sept. 1940).

We have said that this case involves private rights and the record must be approached from this viewpoint. Both parties are seeking, the one to maintain its present financial and economic condition, and the others to likewise better themselves. The case does not involve the usual questions in an industrial dispute—wages, hours and working conditions of present or expectant employees. It is true that it may in a remote sense involve bargaining position somewhere in the remote future, yet the record bespeaks only of the object of increasing the union membership. These statements of fact appearing in the complaint cannot be disregarded. Here the plaintiffs say that there were no employees in the industry and in the neighborhood who were members in the trade union at the time that the strike

campaign was initiated, and that no attack was made on anyone else. Therefore, while we may talk about bargaining position, such bargaining position is far off in the distance and cannot rightfully be considered as part of the case.

The State Supreme Court said, that based upon this record, it became the duty of the Court to square and balance the constitutional rights of both sides of the case; that it became its obligation and duty to protect the plaintiffs' property right and their right of freedom of contract. On the other hand, it recognized the freedom of speech right of the defendants. All these rights were protected by the State Constitution as well as the Federal Constitution, for the State Constitution also contains a Bill of Rights and a section protecting all of its citizens from being deprived of life, liberty or property without due process of law. (Sec. 2a, Art. 2, the Constitution of Illinois of 1870.) But the Supreme Court of Illinois was of the opinion that the defendants were pursuing an unlawful objective and independent of the objectives, were using means which were *per se* libelous trespasses to accomplish that objective; that therefore the defendants were contending for an unbridled license to speak. Therefore, in recognition of these rights, the Court said that both the objective and the means used if permitted to prevail over the property right, would result in a destruction of the plaintiffs' constitutional right and that the defendants were properly enjoined and restrained by the decree. Private libels and private trespasses are not protected by the Fourteenth Amendment constitutional guarantee of liberty of freedom of speech. (See *Near* v. *Minnesota,* 283 U. S. 697.)

The clear and present danger rule does not apply. Mr. Justice Holmes who first enunciated this standard or test in *Schenck* v. *U. S.,* 249 U. S. 47, took occasion in his dis-

senting opinion in *Abrams* v. *U. S.*, 250 U. S. 616 to say:

> "It is only the present danger of immediate evil or an attempt to bring it about that warrants Congress in setting a limit to an expression of opinion, *where private rights are not concerned.*"

Even though it may be said that the present danger test and rule applies, yet this record discloses accomplished trespasses, distinguished from threatened ones—force and pressure—bent upon damage and destruction, which *per se* offers no opportunity t 'est the merits of the conflict by competition for acceptan the market of public opinion. (See *Thornhill* v. *Alabama*, 310 U. S. 88.)

The right of the State to balance constitutional guarantees was recognized by this Court in *Minersville School District* v. *Gobitis*, 310 U. S. 586.

Because this record involves private rights and economic destiny, we respectfully submit that the tests and standards placed and set up by this Court in considering other social and economic legislation, should be applied here. The presumption of validity should prevail; the legislation should not be struck down unless it clearly appears that the decree is unreasonable and arbitrary; the approach should be made from this presumption and not the approach asked for by the defendants, because freedom of speech and freedom of the press may be indirectly involved. (*West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379; *Nebbia* v. *New York*, 291 U. S. 502.)

We therefore respectfully represent and submit that all in all considered, the trade-unions are seeking protection of the freedom of speech guarantees in their pursuit of an unlawful objective in a purely economic controversy; that the liberty of freedom of speech guarantees of the Fourteenth Amendment cannot and should not be construed as offering protection to persons who are engaged in such unlawful objectives.

II.

THE LIBERTY OF FREEDOM OF SPEECH AS EXPRESSED IN THE FIRST AMENDMENT OFFERS FREEDOM ONLY TO THE SPEAKING OF THE TRUTH. THERE IS NO CONSTITUTIONAL PROTECTION OF SPEAKING OR PUBLISHING FALSEHOODS, SLANDER AND LIBEL.

The decree here limits discussion and dissemination of information at or in the vicinity of the place of business. Clause (d) restrains the carrying of banners with legends appearing thereon which the Court found were libelous and trespasses and maliciously made with intent to injure the plaintiffs, in front of and in the vicinity of the place of business (Rec. p. 28).

The restraints on publication found in clause (d) were therefore restraints on speaking or publishing falsehoods and untruths. The defendants were enjoined from continuing to speak and publish that which the Court found was libelous. There was no restraint placed upon them by this clause (d) against any future statements of the truth or statements other than those specifically enjoined.

Even though it may be assumed that dissemination of information concerning the facts of a labor dispute may be defined as public matters, yet the libels here were private libels. They were declared by the court of last resort of the State not to be threatened but accomplished and continuing trespasses and come within the exception noted by this Court in its opinion in *Near* v. *Minnesota,* 283 U. S. 697, wherein at page 716, it is said:

> "* * * Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity."

The restraints here are brought about by a judgment of a court. Courts never deal with the future; judgments and decrees are based upon facts dealing with the present or the past. Court judgments never operate prospectively; they are always considered to operate retrospectively. The judgments and decrees of courts never declare policy. Declaration of policy is a legislative function and the courts, therefore, have been said to be mere interpreters of existing law rather than declarers of future policy. The law enunciated by the courts on matters of substantive law is always subject to change by legislative enactment. Therefore, this decree merely preserves the status quo as it existed immediately prior to the filing of the complaint; it enjoins and restrains only those activities which were carried on at the time of the filing of the complaint and which the Court found to be unlawful, both as to objective and the means used to carry out the objective. Punishment for violating the decree is limited by the terms of the decree and could not extend or operate when there is a change in status of the parties subsequent to the entry of the decree. The court can punish for violation of the decree if the defendants continued to do those acts and things which the decree prohibits. If, for instance, subsequent to the date of the entry of the decree, one of the employees became a member of a trade union there would be a change in status, brought about by new conditions and new facts which would give the trade unions the protection which they seek here by virtue of the provisions of Anti-Injunction of Illinois of 1925. Thereupon, the trade unions could commence a picketing campaign, and such campaign could not be enjoined. No court in Illinois would say that such new change in status could or would constitute a contempt of the court and violative of the present decree. Therefore, we submit that a court decree cannot operate as placing a previous restraint on publishing or speaking within the purview of the Fourteenth Amend-

ment protection of freedom of speech. If the trade union decided to have their members carry banners containing legends which bespeak the truth, such legends could not violate the decree because the decree merely enjoins the speaking of particular falsehoods. Therefore, the injunctional decree cannot be set to operate as a restraint on any speaking other than the speaking and publishing of those matters and things which the Court found to be false and libelous.

In the enforcement of the liberty of freedom of speech, we are concerned with an historic concept. The length and breadth of the freedom must be examined and interpreted in the light of that history. (See *Minersville School District* v. *Gobitis*, 310 U. S. 586.) The Constitution must be examined in the light of the language used; every word must be considered to have been intentionally placed therein. (*Williams* v. *U. S.*, 289 U. S. 553; *U. S.* v. *Butler*, 297 U. S. 155.)

This Court has said that the freedom of speech and of the press are fundamental rights and liberties, and are protected by the Fourteenth Amendment restraint upon States in the same manner and with like effect as the protection afforded under the specific language of the First Amendment and as against the Federal Congress. In *Palko* v. *Conn.*, 302 U. S. 319, at p. 324, this Court has said:

> "... the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress. ...
>
> "We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the

Fourteenth Amendment *by a process of absorption.* These in their origin were effective against the federal government alone. If the Fourteenth Amendment *has absorbed them,* the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. . . . This is true, for illustration, of freedom of thought and speech.

"Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. . . ."

In *Thornhill* v. *Alabama,* 310 U. S. 88, this Court again said:

"The freedom of speech and of the press which are secured by the First Amendment against abridgement by the United States are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgement by the State."

In *Minersville School District* v. *Gobitis,* 310 U. S. 586, it is said:

". . . The First Amendment, and the Fourteenth *through its absorption of the First,* sought to guard against repetition of those bitter religious struggles. . . ."

Therefore, this Court is committed to the doctrine that the language of the First Amendment has become part of the Fourteenth Amendment definition of the word "liberty" by a process of absorption.

The following is the language of the First Amendment:

"*Congress* shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press."

The words "Congress shall make no law," are clear and unequivocal and need no explanation or interpretation. These words import a definite command and restraint upon the legislature (the Congress) of the United States. This is emphasized by the remaining nine Bill of Rights Amendments. Only in the First is a restraint specifically placed upon the legislative branch of government. The restraints of the other nine Amendments are not limited by their language; they are restraints upon all of the three branches of the federal government.

That it was intended that the restraint shall be upon the legislative branch of the government solely and as it appears from the language of the Amendment, is best epitomized in the statement of James Madison, made in the debates in the Virginia legislature on the Virgina resolutions denouncing the Alien and Sedition law. (See "Letters and Writings of James Madison," Vol. 4, p. 542), wherein Mr. Madison said as follows:

> "In the attempts to vindicate the Sedition Act it has been contended—1. That the 'freedom of the press' is to be determined by the meaning of these terms in the common law. 2. That the article supposes the power over the press to be in Congress, and prohibits them only from *abridging* the freedom allowed to it by the common law.
>
> "Although it will be shown, on examining the second of these positions, that the amendment is a denial to Congress of all power over the press, it may not be useless to make the following observations on the first of them: . . .
>
> "The essential difference between the British Government and the American Constitution will place this subject in the clearest light.
>
> "In the British Government the danger of encroachments on the rights of the people is understood to be

confined to the executive magistrate. The representatives of the people in the Legislature are not only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the Executive. Hence it is a principle, that the Parliament is unlimited in its power; or, in their own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people—such as their Magna Charta, their Bill of Rights, etc.—are not reared against the Parliament, but against the royal prerogative. They are merely legislative precautions against executive usurpations. Under such a government as this, an exemption of the press from previous restraint, by licensers appointed by the King, is all the freedom that can be secured to it.

"In the United States the case is altogether different. The People, not the Government, possess the absolute sovereignty. The Legislature, no less than the Executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of laws.

"The state of the press, therefore, under the common law, cannot, in this point of view, be the standard of its freedom in the United States."

Nothing is said by Madison as to the restraint upon the courts; nor does the First Amendment provide for a restraint upon the executive branch of government. It is clear, therefore, that it was the definite intention to place a restraint solely upon the legislative branch of government, and that branch of government only, for it was recognized that under the American system of constitutional government the legislature would have the power and could be counted on to protect the people as against restraints created by the executive. Then, too, the Federal Congress and all state Constitutions grant to the Legislatures the power and authority to determine both the original and appellate jurisdiction of the courts of the United States and the states, and, therefore, could be relied upon to limit the jurisdiction of the courts so as to prevent the possibility of the entry of judgments and decrees which would provide for general previous restraints or licenses upon speaking or publishing, all as is evidenced by the Clayton and Norris-La Guardia Acts. It was further recognized that court judgments under the common law could not operate as previous restraints by the very nature of purpose of court decrees which operate retrospectively and not prospectively.

If this case were brought in the courts of the United States (assuming that the courts of the United States had the jurisdiction which the courts of the State of Illinois had at the time of the entry of the decree here) defendants could not successfully contend that the court decree operated as a previous restraint on their right to speak; for they would be met with the argument that by the language of the First Amendment the restraint provided for is one which is applicable by its very language, solely to the legislative department of government and not to the courts. Here, in this case, this Court is

asked to grant the constitutional protection as against a decree of the State court.

We submit that in spite of the fact that this Court has defined the word "state" as it appears in the due process clause of the Fourteenth Amendment as being all-inclusive, *i.e.*, including therein all branches of the state government, that the absorptive process cannot be said to carry with it a widening of scope, and that the Fourteenth Amendment protection of freedom of speech cannot be said to be greater than the First Amendment protection. We submit and urge that the defendants here are asking this Court to perform a legislative function.

This Court is bound by the language as it appears in the Constitution where the language offers neither the necessity or advisability of explanation and construction. The First Amendment, by its language, denies the right of the Federal Congress to pass any legislation dealing and treating with the subject of religion or the free exercise thereof. In the case of freedom of speech the Congress is denied only the right to *abridge* freedom of speech and freedom of the press. The use of the word "abridge" would indicate that there was a well conceived and recognized liberty or right of freedom of speech in existence at the time of the adoption of the Amendment. From a reading of all of the arguments made in favor of the adoption of the Amendment, particularly the arguments made by James Madison, (some of which appear in the opinion of this Court in *Near* v. *Minnesota*, 283 U. S. 697, and included in that part of the discussion on the Virginia Resolutions which we have hereinabove quoted) it would appear that the freedom of speech protected was the right to freely discuss public questions in public places, as well as in the legislatures. These public questions appear to be defined as addressing themselves to the political affairs of the government and the conduct of public officials while

in office. The fight here in America was not so much against previous restraints as against subsequent punishment, for it will be recalled that the doctrine which permitted previous restraints of publication by license or otherwise was declared contrary to the rights of the people and was definitely established in England prior to the time of the adoption of State Constitutions in the thirteen original States. The quarrel was with the statement, "the greater the truth the greater the libel," when public men and public discussions with reference to the administration of office were concerned. By the time of the adoption of the State Constitutions, the English common law and the English Parliament seemed to be committed to an underlying philosophy that it was the "tendency" of the publishing or speaking which controlled; in other words, every man had the right to speak freely or to publish both false and true statements, but the truth was no defense. If the tendency of the truth were to bring parliamentary officials or other public officials into disrepute in the eye of the public, then, even though true, the publisher was guilty of a crime. The question of the "bad tendency" of the publishing or speaking was to be determined by the court; the jury was limited in its deliberations solely to the question as to whether or not there was any publishing or speaking as charged in an indictment. By the Alien and Sedition law, an attempt was made to change the words "bad tendency" to "motive," on one hand, and on the other to make truth a defense and to leave all questions to the jury for determination. The fight, therefore, here in America was primarily addressed to the "bad tendency" rule and was accentuated by the attempt to substitute "motive" for "bad tendency" by the Alien and Sedition Law.

All that we have said here is expounded upon by Prof. Schofield in an article referred to with approval by this

Court in *Thornhill* v. *Alabama*, 310 U. S. 88, and appearing in 9 Proc. American Sociol. Soc., beginning at page 79. Prof. Schofield concludes that the true definition of freedom of speech and freedom of the press in connection with public libels as it existed at the time of the adoption of the First Amendment, is as follows:

> "The true view of the original declarations of liberty of the press would appear to be, then, that they wiped out the English common law test of supposed bad tendency as to opinion makers, and substituted the test of the truth as a dividing line between lawful and unlawful publications on matters of public concern. . . ."

Therefore, the American definition of freedom of speech placed emphasis on truth, and "the greater the truth the greater the libel" never has been a part of the American concept. The law of private libel as it exists today is essentially the same as it existed at the time of the adoption of the Constitution. Private libels were always punishable as a crime; or the one libeled had redress in the courts always available to him by the common law. Truth was always a defense, regardless of tendency or motives. (See Schofield, "Freedom of the Press in the United States," 9 Proc. American Sociol. Soc.)

Therefore, we respectfully submit that the First Amendment from an historical point of view cannot be said to include, under a definition of "public questions," the dissemination of information concerning the facts of a labor dispute. This definition might be included by enlarging legislation of the Congress and made applicable to both the federal government and to the states as well. It should not be enlarged by the Courts. We further urge that the defendants cannot properly maintain that the state court decree operates as a previous restraint because

they are seeking the constitutional protection not only in furtherance of an unlawful objective but for the purpose of speaking and publishing falsehoods and untruths.

We also call attention to a statement appearing in defendants' brief (p. 36) wherein it is asserted that the Fifth as well as the Fourteenth Amendment protects the liberty of freedom of speech. Such a statement defies all underlying principles of constitutional or statutory construction. Protection of the First Amendment cannot be said to be included within the Fifth because it is a recognized principle of constitutional construction that different parts of an organic document cannot be construed as covering the same ground. If the framers of the Bill of Rights Amendments had intended that the restraints of the First Amendment should be included within the restraints of the Fifth Amendment, they certainly would not have presented the First Amendment for adoption as a separate and distinct Amendment. (See Mott, "The Process of Law", 1925 Ed. p. 276; Payne, "The Constitution of the United States," p. 45; Warren, "The New Liberty under the Fourteenth Amendment," 39 Har. Law Rev. p. 431.) We do not wish to be understood as calling attention to this statement merely for the purposes of criticism. Reference thereto is made solely for the purpose of forestalling any further attempt, hereafter, to urge that the protection sought is included in the Fifth Amendment restraints; and therefore that because the Fifth Amendment does not provide for specific restraints on any particular branch of the federal government, that the absorptive process can be said to be thus unlimited in scope.

III.

THE FOURTEENTH AMENDMENT GUARANTEE OF PROTECTION OF FREEDOM OF SPEECH DOES NOT PROTECT THE USE OF FORCE.

By paragraphs (e), (f) and (g) of the injunctional order, the defendants are enjoined and restrained from violence, threats and intimidation. It must be presumed that these restraining provisions of the decree are based upon the facts; otherwise, the Court in entering the decree would not have been impelled to include these restraining provisions in the decree. (See Br. pp. 6-8.)

The complaint here charged threats, intimidation and the fostering, aiding and abetting of a secondary boycott. The defendants on the second appeal (the writ of error proceedings) in the Supreme Court of Illinois, conceded that the issues in the second case were fully settled and determined in the first appeal, to-wit: the opinion of the Supreme Court found in the record (Rec. p. 24) was rendered and filed on the first appeal. Therefore, it ill behooves them in this Court and at this time to contend that there should or can be any differentiation between the issues on the first appeal and the issues on the second appeal.

It will be recalled that the first appeal was taken from an order dismissing the complaint on application of the defendants to dissolve the preliminary injunction; the second review was sought from the final decree entered in the Appellate Court. Therefore, we reiterate that all presumptions are indulged in, in favor of findings of fact having been made by the Court entering the decree (although not expressed in the decree) and which were the basis for the entering of each and every clause of the injunctional order.

It is asserted by the defendants in their brief that the statements contained in the complaint to the effect that the legends on the banners carried by the pickets were libelous and maliciously made, was a conclusion of the pleader and that it was so found by the Supreme Court of Illinois. Mention was made thereof by the Supreme Court of Illinois, but that court said: "The very fact that the employer and all of his employees joined in this suit sufficiently established it," viz.: that the banners contained untrue statements which were maliciously made. The statement with reference to the conclusion of the pleader is confined by th Court to the word "malice."

The record here amply demonstrates that the legends on the banners were both untrue and maliciously made. The following facts appear from the complaint: (a) that the employer was willing to enter into a closed shop agreement and so told the union officials when they called upon him in the month of April, 1937. His position was, that if his employees would become members of the trade union he would be willing to operate a closed shop. (b) The employer permitted the union organizers to speak to his employees and solicit membership on the business premises. (c) It was not until the employees refused to join the union and the union officials insisted that he enter into contractual relationships with the union and then threatened to call a strike unless he agreed either to force his employees to sign applications for membership or employ union members and discharge his present employees, that the employer refused to sign the closed shop agreement. Therefore, it clearly appears from the pleaded facts that the statements appearing on the banners to the effect that the employer would not permit collective bargaining and was unfair to union labor and the trade unions in question, were clearly untrue statements and maliciously made as part of a strike campaign in order to damage and

injure the employer as well as the employees. Such libelous statements were intentionally made as part of a campaign in which the ultimate objective was unlawful. The finding of malice is amply supported, both by the record and the substantive law of the State of Illinois. (See *Meadowmoor Dairies* v. *Milk Wagon Drivers Union*, 371 Ill. 377.)

The statement of the Supreme Court of Illinois to the effect that the campaign consisted of accomplished libels and continuing trespasses and as part of a campaign of force, is also amply supported by the record. This is particularly emphasized by the fact that in plaintiffs' complaint it appears that two customers were threatened by pickets (Rec. p. 6). In addition thereto, the complaint sets up facts from which it may be rightfully assumed that the charge of the complaint that the defendants were aiding and abetting a secondary boycott was true (Rec. p. 11).

It appearing to the Supreme Court of Illinois that these acts of threat and intimidation actually took place, the Court said, in referring to the use of force and the use of the boycott brought about by the signs and banners, "To whatever extent these rules are violated we have lawlessness, and under such circumstances a court of equity will not pick and choose among the unlawful acts and threats, but will enjoin the whole scheme" (Rec. p. 28). Therefore, the Supreme Court of Illinois took the position that the entire campaign was one in which threats, intimidation and libels were a part, and would not pick and choose but would treat all of the means on the same basis. (See also *Am. Steel Foundries* v. *Tri-City Council*, 257 U. S. 184.)

This pronouncement being the last enunuciation of the substantive law of the State Court and in the case at bar, we submit that this statement of law must prevail over any statement which may be found in the opinion of that

court in the case of *Fenske* v. *Upholsterers Union,* 358 Ill. 239, quoted from in the defendants' brief on page 16. Certainly this statement of law must have binding force and effect in this case. This statement of state substantive law is binding upon this Court. (*Senn* v. *Tile Layers Union,* 301 U. S. 468; *Erie* v. *Tompkins,* 304 U. S. 64.)

Therefore, we have in this case the actual use of force in addition to unlawfulness of the objective. The use of force has always been condemned by this Court; for it has been said by this Court:

> "The constitutional guarantee of free speech does not protect a man from an injunction against uttering words that have all the effect of force."

(*Gompers* v. *Buck Stove & Range Co.,* 221 U. S. 418; *Aikens* v. *Wisconsin,* 195 Wis. 193; *Near* v. *Minnesota,* 283 U. S. 697; *Senn* v. *Tile Layers Union,* 301 U. S. 468.)

No complaint is made here as to the remedy provided for under the laws of the State of Illinois. The Supreme Court of Illinois has stated in its opinion that a court of chancery had the power and jurisdiction to hear the case and to grant injunctional relief. It certainly cannot be said that the relief granted has no relationship to or is unreasonable when examined in connection with the evil sought to be protected against. This Court has always said that the due process clause of the Fourteenth Amendment does not undertake to regulate or control the power of a State to determine by what process legal rights may be ascertained or what remedy shall be provided for to protect and enforce legal rights. (*Honeyman* v. *Hanan,* 302 U. S. 575.)

CONCLUSION.

Defendants in their brief (pp. 14 to 22) call attention to the fact that there is a contrariety of policy in the several States, both by the decisions of the courts under the substantive law and by legislation passed by the legislative assemblies. They say that there should be one national policy, and they ask this Court to declare such policy by a decision and opinion in this case. The best answer to this argument is found in the words of Mr. Justice Holmes in his dissenting opinion in *Truax* v. *Corrigan*, 257 U. S. 312, at p. 344:

> ". . . There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect. . . ."

Respectfully submitted,

MYER N. ROSENGARD,
SAMUEL A. RINELLA,
Counsel for Respondents.

EUGENE W. SCHOFLER,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

AMERICAN FEDERATION OF LABOR; JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

Petition for Rehearing.

MYER N. ROSENGARD,
SAMUEL A. RINELLA,
Counsel for Respondents.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 56

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

Petition for Rehearing.

Now come Ross W. Swing, Irene Boivin, Nan Chapman, *et al.*, respondents, and petition this Court for a rehearing of this case, and respectfully show unto the Court:

I.

The Constitution of the United States is not intended to embody a particular economic theory, whether of paternalism and the organic relation of a citizen to the state or of laissez faire. (See Mr. Justice Holmes, Lockner v. New York, 198 U. S. 45, 75). If the right to regulate local problems thrown up by modern industry and to preserve the peace is axiomatic, then the length and breadth of any economic circle involving local problems is a matter of state police power. The point at which the cost of competition becomes too great is a

matter for determination by wise statesmanship and not by the courts. (See Frankfurter & Greene, "The Labor Injunction," p. 205). Declarations of common law made by this court while persuasive are not binding upon the courts of the states. Whether or not the court of last resort of a state wishes to accept or reject such enunciations of common law is a matter of state policy. To declare that the common law as enunciated by this court is binding upon the states is an unconstitutional invasion of state powers. (Erie v. Tompkins, 304 U. S. 64.) State action is presumed to be constitutional until the contrary appears. While the scope may be narrower where freedom of speech is involved, yet the presumption must prevail unless in the light of the facts, the presumption that the action rests upon some rational basis is overcome. (United States v. Carolene Products Co., 304 U. S. 144.) Public needs when weighed against individual desires raised questions involving contemporary economic and social conditions at a given time. By striking down this decree on its face and disregarding such economic and social conditions, alluded to and discussed in respondents' brief (pages 34 to 56) the opinion of this court overrules its opinion in New York ex rel O'Keefe, 306 U. S. 466, 499, and thereby in effect makes the freedom of speech guarantee a dogma of the absolute, and grants an unbridled license to speak in industrial conflicts between trade unions and industry. This opinion is contrary to the opinions of Mr. Justice Brandeis in Dorchy v. Kansas, 272 U. S. 306; Senn v. Tile Layers Union, 301 U. S. 468. This opinion also defies the fundamental precepts found in the opinions of Mr. Justice Brandeis in Erie v. Tompkins, 304 U. S. 64 and Truax v. Corrigan, 257 U. S. 312, 354.

By the opinion here, this Court has declared that the State of Illinois is limited by constitutional coercion from denying in a circumscribed way the right to the use of the

public streets by trade unions in organizational campaigns to unionize workers in a particular industry. We believe that we rightfully assume from the language appearing in the opinion, "the interdependence of economic interest of all engaged in the same industry has become a commonplace . . ." that this Court was of the opinion that unless the ultimate purpose sought to be attained by trade unions here was lawful, the state would have the right to deny the use of the public streets for the purpose of communicating the facts of the particular labor dispute. Therefore, this Court concluded that based upon this statement which appears in *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184, 209, such was the common law to be followed, and that therefore the action of the State in the case at bar was tantamount to drawing a circle of economic competition so small as to amount to a denial of the freedom of speech guarantee of the Fourteenth Amendment. This thesis results in a policy declaration which is far reaching and affects not only the State of Illinois but the economic and social destiny of each and every of the forty-eight States. We believe that we may also assume that this Court considered as an unrebuttable presumption of fact that peaceful picketing by trade unions in front of the employer's place of business was the only effective means or tool in the hands of the trade unions to bring their cause before the public, and in this day and age.

The petitioners here did not complain in the state courts, nor do they seek review here of that part of the order which enjoins and restrains intimidation, threats and violence. (See petition for writ of certiorari, p. 1.) *Nor did they complain in the state courts of the procedure followed in the entry of the final decree by the Appellate Court. As a matter of fact and as stated in the dissenting opinion here, they themselves and in their briefs filed in the Supreme Court of Illinois, in seeking review of the Appellate Court final decree, conceded that the permanent in-*

junctional decree was properly entered, and assigned as error only the constitutional questions which came into play by virtue of that part of the decree which enjoined the so-called "peaceable activities." (See Record p. 39.) *In their petition for writ of certiorari (p. 10) they do not contend that the decree as entered in the Appellate Court of Illinois was a denial to them of a full opportunity to be heard; their sole complaint is that the injunction deprives them of the liberty of freedom of speech.*

Under Illinois practice the decretal part of a chancery decree controls; the preamble plays no part. If the decretal part of the order and preamble are inconsistent, the former prevails. (*City of Joliet* v. *Alexander,* 194 Ill. 457; *Slotzky* v. *Robe,* 189 Ill. App. 537; *Biggs* v. *Obermeyer,* 292 Ill. App. 79; see also Sec. 188, Chap. 110 Ill. Rev. Stats. (1939).) See also *Checkik* v. *Koletzky,* 305 Ill. 518; Puterbaugh Chan. Pl. & Prac., (7th ed.) p. 404. The petitioners in their petition for writ of certiorari and briefs made this concession: they made no attack upon the decree because of the preamble (Petition for writ of certiorari p. 11). Their only attack was upon the decretal part of the order. In the opinion of the Supreme Court of Illinois (Rec. p. 24) the Supreme Court of Illinois did not deny to the trade unions all right of communication; it sustained a decree which denied the right of communication by picketing in front of and adjacent to the employer's place of business, and denied the right to the trade unions by the direct boycott to influence or attempt to influence all persons either from entering the employ of the employer or entering his place of business or trade with him.

By the controlling part of the decree the defendant trade unions and their membership and officials are therefore restrained from conducting the picketing activities and the carrying of banners which designated the plaintiff's business as unfair to organized labor, or designed to induce or influence persons not to enter the place of business on

the sidewalk in front of the employee's place of business; and from seeking by direct boycott to influence persons not to enter the employer's employment or to trade with him. The decree therefore does not in any way deny to the trade unions the right of communication in other well recognized places and by other accepted methods of publicity.

We submit that the Court erred in treating the statement of common law appearing in its opinion in *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 184, 209, as a basic precept applicable to the record here, is itself guilty of an unconstitutional interference with the right of the States to declare and determine their own policy relative to their own internal affairs. (See *Erie* v. *Tompkins*, 304 U. S. 64.) The State of Illinois, through its court of last resort, and by the opinion of this Court in *Erie* v. *Tompkins, supra*, had the constitutional right to determine for itself what should be its internal policy as to the length and breadth of trade union self-interest in dealing and treating with its own economic problems. Once having declared the policy, such declaration of policy was binding upon this Court. The declaration of policy aforementioned is contrary to the opinions of Mr. Justice Brandeis in *Dorchy* v. *Kansas*, 272 U. S. 306, and *Senn* v. *Tile Layers Union*, 301 U. S. 468. We submit that in both of these opinions this Court declared that the Fourteenth Amendment offers no constitutional blessing to all right to conduct trade union campaigns by the strike in all of the self interest objectives. We respectfully urge that it is a logical inference from the language of the opinion in *Senn* v. *Tile Layers Unions, supra*, that the length and breadth of trade union objectives is a matter of state policy—and state wisdom and that any declared policy offers no denial of the Fourteenth Amendment protection. If the State has the inherent police power to enlarge its policy as to

trade union objectives, then we submit that the State has the equal right to refuse to so enlarge, and that the latter policy is equally a matter of wisdom as the former. The industrial conflict between labor and capital is one which has been recognized as lawful, based upon the doctrine of free competition in the competitive arena. The determination at precisely what point the cost of the competition becomes too great is one which deals with wise statesmanship. It is not the function of the courts to determine this question. (Frankfurter & Greene, "The Labor Injunction," p. 205.)

The historic concept of the competitive right is based upon the recognition that the picketing campaigns and the publicity attendant thereby and the strike itself cause damage and injury. Relief is denied to industry by the doctrine that free competition and the right to compete offers a complete justification and the injury becomes *damnum absque injuria.* (See Holmes "Privilege, Malice and Intent," 8 Har. Law Rev. 1) (*Vegelahn* v. *Guntner,* 167 Mass. 92, 107, dissenting opinion of Mr. Justice Holmes.) The lawful length and breadth of lawful trade union self-interest is an issue which has been the subject matter of serious debate over a period of many years. Even today the question cannot be said to be definitely settled one way or the other. Honest men, judges and courts have and do differ even today. (See opinion of Mr. Justice Brandeis, *Truax* v. *Corrigan,* 257 U. S. 312, 354; Frankfurther & Greene, "The Labor Injunction," p. 47; Warm's "A Study of the Judicial Attitude Toward Trade Unions and Labor Legislation, 23 Minn. Law Rev. 255, 274.) Therefore, this issue is one which cannot be said, even today, has been accepted and recognized as settled and determined. We submit therefore that the law in this case must be, viz.: that the trade unions here at the time of the entry of the injunctional order were engaged in a

strike campaign in which the ultimate objective was unlawful; the primary issue and question before this Court is whether or not the State had the right to regulate the use of the public streets so as to deny the right to picket where those engaged therein were so doing in furtherance of an unlawful end; or does the Fourteenth Amendment guarantee of liberty of speech deny to the State the power under practically every and all circumstances to refuse the use of the public streets by picketing, etc., to trade unions engaged in such unlawful campaigns. It must be conceded that the decree does not seek to enjoin and restrain the use of the public highways in carrying out all possible objectives, both lawful and unlawful, as in (*Thornhill* v. *State of Alabama,* 310 U. S. 86). In this respect, the decree merely seeks to restrain the use of the public streets in the carrying out of a particular objective declared unlawful by the policy of the State. The decree does not cover within its ambit all trade union activities; *Thornhill's* case does not apply.

We submit that in *Senn* v. *Tile Layers Union,* 301 U. S. 468, this Court committed itself to the doctrine, viz., that the common law precept, that the picketing and strike campaign can only win immunity from the lawfulness of the ultimate purpose does not defy the Fourteenth Amendment definition of freedom of speech. (See also Frankfurter & Greene, "The Labor Injunction," p. 25.) For it will be recalled that in the opinion of *Senn* v. *Tile Layers Union, supra,* this Court in declaring that freedom of speech is guaranteed by the Fourteenth Amendment, and after making such statement, further declared, immediately following this statement with reference to freedom of speech, "the state may in the exercise of its police power regulate the method and means of publicity as well as the use of the public streets." The quotation appearing in the opinion of this Court, from the *Senn* case, is only part of

the statement found in the opinion in the cited case. It will also be recalled that immediately following this statement, this Court continued by stating in effect that if the end sought is not forbidden by the Constitution, the State may authorize workingmen to picket.

This Court and the Illinois courts recognize that the right to conduct business without interference and the right of employees and customers to ingress and egress to an employer's place of business without being compelled to run the gauntlet of the picket line or even to pass one picket is a right which the Fourteenth Amendment also protects. Even though the Civil Liberty rights may be said to be of such basic and paramount importance in this country that they may destroy (wherever necessary) the property right when the two clash, yet we believe that the right to destroy should be conceded at least to be partly within the control of the state. By this we mean that contemporaneous social and economic conditions in the State at a given time should be inquired into, and that the result of the inquiry should control the conclusion whether in a given case the constitutional protection of the Civil Liberties and of the property right impels the declaration that the civil liberty may destroy the property right. This we submit is the underlying philosophy of both Mr. Justice Brandeis and Mr. Justice Holmes as epitomized in their opinions in the case of *Truax* v. *Corrigan,* 257 U. S. 312. Therefore, we respectfully suggest that this Court erred in failing to take into consideration the social, economic and contemporaneous conditions in the State of Illinois, and that this Court erred in striking down the decree without at least making inquiry or alluding to these conditions; for we called attention in our brief (and we believe that this should have been somewhat persuasive) to the fact that although bills were introduced at sessions of the Illinois legislature by trade unions, in the years 1933, 1935,

1937 and 1939, and by which it was sought to make the objective of the trade unions here lawful by legislation, the Illinois legislature refused to pass such legislation. Other contemporaneous, economic and social conditions were discussed in our brief, which should have been and were apparently not considered by this Court. (See Respondents' brief pp. 34 to 56.) Therefore, we say that when a state court says to the trade unions, "Your objective here is unlawful. Experience has taught us in this State that your campaigns of picketing and patrolling in fact injure the employer; his right and his employees' right to conduct their business without such inference is protected by the same Constitution as you are protected in your right to freedom of speech. If you can succeed in changing the public opinion as it now exists and as we know it, by publicity and effort, without causing a direct injury while so doing, we will permit you so to do. However, we will not permit you to injure and damage while you are molding this public opinion," that such declaration of policy and without further adieu cannot be said to be clearly defiant of the freedom of speech guarantees of the Fourteenth Amendment.

We further submit that by this opinion this Court has in effect said to the trade unions and to the people of this country that trade unions have the complete *laissez faire* right in the competitive process to carry their objectives to doctrinaire limits. If the Fourteenth Amendment offers constitutional protection to the organization campaigns against an entire industry, then it naturally follows as a logical and natural sequence and it appears to us to be immediately in the offing, that trade unions will assert and claim that the ultimate objective of the entire trade union movement, to-wit: that all labor must belong to trade unions, and that there can be no labor other than the trade union labor in the United States is equally constitutionally protected by the Fourteenth

Amendment. When is the economic circle of competition too narrow? Is it for this Court to determine in each and every case, or is this a matter which is relegated under our American system of government to wise statesmanship and not to the courts?

The implications of this opinion are far reaching and dangerous. If the self-help campaigns of trade unions in the competitive process of free competition is constitutionally protected, all competitive process and competition are likewise equally protected. All matters which affect the large consumer public—the farmer and others—not members of trade unions, must be conceded to involve public questions as this term is defined by this Court in *Thornhill* v. *Alabama,* 310 U. S. 86. Therefore, picketing will be asserted to be constitutionally protected in all competitive wars and campaigns. Competitors will contend that they have the right to picket their competitors because their competitor undersells them; because he refuses to keep his store closed on certain days during the week or on Sunday. Employers associations may successfully contend that they have the right to picket and boycott those who will not become members of their associations; employers will assert that even under the National Labor Relations Act that the opinion here grants them the right in the exercise of their freedom of speech to boycott, picket, persuade and entreat employees to refuse to join the trade union or to join a company union or a particular union. Trade unions will claim constitutional protection in picketing each other. Housewives and other consumers would have the right to picket chain stores because they believe that the chain stores are an economic evil; manufacturers will picket retailers because they do not sell the manufacturer's product. Thus in the entire gamut of the field of competitive process there will be claims and assertions that by this opinion picketing, patrolling and persuasion are guaranteed to all engaged

in competition by the constitutional coercion of the Fourteenth Amendment.

When we see all around us today that free competition as to industry and as protected in the years past by this Court under the declaration of constitutional precept, has resulted in the necessity of a change in policy so as to break down what appears to be a tendency of free competition to create trusts and monopolies, and that therefore the ravages of industrial *laissez faire* are extremely harmful, we respectfully submit that the present policy should apply equally to labor self-interest. Experience should teach us that prevention is much better than cure.

If this Court has presumed as a matter of law or fact that the use of the highways by picketing by trade unions is the only effective way of free communication, then we say that this Court has erred in engaging in such presumption, and has certainly erred in making such presumption a conclusive one. To treat the object and purpose of the picketing as being merely for the purpose of persuasion and communication to and of the public is defiant of the historic concept of picketing; for it will be recalled that the trade unions originally offered justification of the right to picket because they wished to watch their members so as to prevent internal sabotage. (See Cogley Strikes and Lockout (1893) p. 193). As time went on, the picketing was justified in this country on the theory that self-interest permitted and justified trying to keep persons from entering the employ of the employer and to persuade employees to leave the employ. Later it was justified as a means of bringing home to the public the merits of the immediate conflict. We respectfully submit that underlying the right and justification of the publicity by the picketing there is the presumption of fact that in the contest the trade union occupies an unequal financial position and cannot on an equal basis compete with the

employer in the publicity campaign. This underlying precept therefore is based upon economic conditions of a time and must change as the contemporary economic and social conditions change. It must be conceded that the publicity by picketing does injure and does have the effect in fact of a pressure campaign brought about by the very presence of the pickets, to deter customers from trading with the attacked employers. The pickets by their very presence, as has been testified to by thousands of cases reported in our books, have the effect of putting a fear in the minds of the employees. They do in fact impede free ingress and egress to the employers' premises. (See "Picketing by Business Competitors," 87 Univ. of Penn. Law Rev. p. 280; "Peaceful Picketing and Freedom of Speech," American Bar Journal (issue Sept. 1940). In our brief (pps. 34 to 56) we have called attention to what we believe to be the actual contemporaneous, economic and social conditions existing in Illinois at the time of the entry of the injunctional order. We believe that we have demonstrated in fact that the trade union defendants in this case do and have by far the greater financial ability compared with the particular employer to present their cause through the ordinary media of publicity. One of the petitioners owns and operates a large radio station in the City of Chicago. (See *Leitzman* v. *Radio Broadcasting Station,* 282 Ill. App. 203.) Two of the petitioners publish and circulate newspapers in the City of Chicago. Judicial notice must be taken of the fact that the public press is today open to the trade unions equally with industry and they have the financial ability to publicize in the general newspaper columns as well as by advertising their side of labor disputes. We say that this Court erred in failing to take these factors into consideration; that these matters of fact are important and should form a part of the consideration and ultimate conclusions of this Court; that such has been recognized by

this Court in *Muller* v. *Oregon,* 208 U. S. 412; Mr. Justice Brandeis, *Truax* v. *Corrigan,* 257 U. S. 312; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152.

We respectfully submit that in failing to take due recognition to these factors, this Court has turned the clock back to *Lockner* v. *New York,* 198 U. S. 45; *Coppage* v. *Kansas,* 236 U. S. 1; *Adkins* v. *Childrens Hospital,* 261 U. S. 525, 567, the majority opinions of which Mr. Justice Holmes and Mr. Justice Brandeis so vigorously protested against by their dissenting opinions; and which dissenting opinions appear to us to have become the majority opinions of this Court in the case of *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, and in other similar cases involving economic and social destiny.

We offer apologies and beg to be excused for engaging in a polemical discussion in a petition for rehearing. We have done so because we honestly and sincerely believe that this case is of tremendous importance and affects the well being and welfare of our generation and those yet to come. May we suggest without being considered presumptuous or intentionally violating the rules of this Court, that by reason of the far reaching effect of this opinion and the matters to which we have called attention in this petition for rehearing, that a reargument of the case may be in order.

May we further suggest that in the event this Court should be of the opinion that a rehearing should not be granted, that an order of complete reversal should not be entered, for the petitioners here and in this court seek only a reversal of a part of the final decree of the State Courts. Therefore, the order of this Court should be that the decree be reversed as to those parts thereof indicated by the opinion of this Court, and affirmed as to the remainder of the decree.

For the foregoing reasons, it is respectfully urged that the petition for rehearing be granted, and that the judgment and decree of the Supreme Court of the State of Illinois be, upon further consideration, affirmed.

Respectfully submitted,

MYER N. ROSENGARD,
SAMUEL A. RINELLA,
Counsel for Respondents.

CERTIFICATE OF COUNSEL.

We, Myer N. Rosengard and Samuel A. Rinella, counsel for the above named respondents, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

MYER N. ROSENGARD,
SAMUEL A. RINELLA,
Counsel for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 56.—October Term, 1940.

American Federation of Labor, John Fitzpatrick, Chicago Federation of Labor, et al., Petitioners,
vs.
Ross W. Swing, Irene Boivin, Nan Chapman, et al.

On Writ of Certiorari to the Supreme Court of the State of Illinois.

[February 10, 1941.]

Mr. Justice Frankfurter delivered the opinion of the Court.

In No. 1, *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, decided this day, we held that acts of picketing when blended with violence may have a significance which neutralizes the constitutional immunity which such acts would have in isolation. When we took this case, 310 U. S. 620, it seemed to present a similar problem. More thorough study of the record and full argument have reduced the issue to this: is the constitutional guarantee of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?

A union of those engaged in what the record describes as beauty work unsuccessfully tried to unionize Swing's beauty parlor. Picketing of the shop followed. To enjoin this interference with his business and with the freedom of his workers not to join a union, Swing and his employees began the present suit. In addition, they charged the use of false placards in picketing and forcible behavior towards Swing's customers. A preliminary injunction was granted. Answers were then filed denying violence as well as falsity of the placards. The union also moved to strike the complaint and the trial court, finding the complaint wanting in equity, granted the motion and dissolved the preliminary injunction. The appellate court, one of Illinois' intermediate courts of review, held that the trial court was in error. 298 Ill. App. 63. This action of the appellate court was affirmed by the state supreme court. 372 Ill. 91. It found that the complaint properly invoked equity for three reasons: (1) there was no dispute between the em-

ployer and his immediate employees; (2) the placards were libelous; (3) there were acts of violence. Inasmuch as the supreme court affirmed the issuance merely of a preliminary injunction, we denied certiorari for want of a final judgment. 309 U. S. 659. Thereupon, although as we have seen issue had been formally joined on the claims of libel and violence, the appellate court, by a procedure unrevealed by the record and without opinion, entered a permanent injunction ranging from peaceful persuasion to acts of violence. The decree recited "that this Court and the Supreme Court of this State have held in this case, that, under the law of this State, peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (i. e., where there is not a proximate relation of employees and employer), and that appellants are entitled in this case to relief by injunction against the threat of such peaceful picketing or persuasion by appellees". The union sought review of this decree in the supreme court by writ of error. Swing and his employees moved to dismiss the writ because in seeking to obtain it the union had conceded that "all issues of the case have been settled on prior appeal and that the decree entered by the appellate court is in conformity with the mandate issued" to the appellate court. The writ was dismissed.

Such is the case as we extract it from a none too clear record. It thus appears that in passing upon the temporary injunction the supreme court of Illinois sustained it in part because of allegations of violence and libel. But our concern is with the final decree of the appellate court. On its face the permanent injunction in that decree rested on the explicit avowal that "peaceful persuasion" was forbidden in this case because those who were enjoined were not in Swing's employ. Moreover, as we have seen, the supreme court of Illinois dismissed proceedings before it to review that decree on representations that the decree was in accordance with its mandate on the temporary injunction.

Since the case clearly presents a substantial claim of the right to free discussion and since, as we have frequently indicated, that right is to be guarded with a jealous eye, *Herndon* v. *Lowry*, 301 U. S. 242, 258; *Schneider* v. *State*, 308 U. S. 147, 161; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152n., it would be improper to dispose of the case otherwise than on the face of the decree, which is the judgment now under review. We are therefore not called upon to consider the applicability of *Milk Wagon Drivers Union* v.

Meadowmoor Dairies, Inc., supra, the circumstances of which obviously present quite a different situation from the controlling allegations of violence and libel made in the present bill.

All that we have before us, then, is an instance of "peaceful persuasion" disentangled from violence and free from "picketing *en masse* or otherwise conducted" so as to occasion "imminent and aggravated danger". *Thornhill* v. *Alabama,* 310 U. S. 88, 105. We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no "peaceful picketing or peaceful persuasion" in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.

Such a ban of free communication is inconsistent with the guarantee of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. *American Foundries* v. *Tri-City Council,* 257 U. S. 184, 209. The right of free communication cannot therefore be mutilitated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's* case. "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." *Senn* v. *Tile Layers Union,* 301 U. S. 468, 478.

Reversed.

Mr. Justice BLACK and Mr. Justice DOUGLAS concur in the result.

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SUPREME COURT OF THE UNITED STATES.

No. 56.—October Term, 1940.

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On petition for Writ of Certiorari to the Supreme Court of the State of Illinois.

[February 10, 1941.]

Mr. Justice Roberts.

I am unable to agree to the court's disposition of this case. I think the writ should be dismissed or the judgment affirmed.

The record presents difficult questions concerning Illinois procedure, as to which the parties are in disagreement, and we ought not to attempt to resolve them.

The respondents filed a complaint in the Circuit Court, on which a temporary injunction issued. The petitioners answered. They also made a motion to dismiss the complaint and that motion was granted, with the result that the temporary injunction was dissolved. On appeal, the appellate court reversed the order dismissing the complaint. From that action an appeal was taken to the Supreme Court of the State, which affirmed the decree of the appellate court. On analysis of the complaint, the Supreme Court found that it charged that no dispute existed between the employer and his employees; that the petitioners had been indulging, and were continuing to indulge, in a series of libels against the respondents; were indulging and were continuing to indulge, in threats and acts of violence. The grounds on which the court sustained the complaint as stating a cause of action in equity are summed up in the conclusion of its opinion thus: "A State or nation ceases to be sovereign if it tolerates within it any force other than its own, and that force must be such as is established by law, directed by the courts, observing the principles of due process and equal protection of the law. To whatever extent these rules are

violated we have lawlessness, and under such circumstances a court of equity will not pick and choose among the unlawful acts and threats but will enjoin the whole scheme."

Thereafter the record discloses merely that the cause came on for further hearing in the appellate court. We do not know whether that hearing was upon the bill and answers or upon the complaint and the motion to dismiss, and the parties are in grave dispute on the subject. We do know from the record that the appellate court, after reciting the previous history of the case, including the affirmance of its judgment by the Supreme Court, and a statement that, under the law of Illinois, peaceful picketing is unlawful when conducted by strangers to the employer, coupled with the further statement that the respondents were entitled "in this case" to relief by injunction against the threat of such peaceful picketing, and that the respondents had maintained their complaint and the equities of the case were with them, the appellate court proceeded to decree "in accordance with the mandate of the Supreme Court of Illinois", that the petitioners should be enjoined from picketing or patrolling respondents' shop, exhibiting signs and placards to persuade persons to refrain from entering the place of business and from acts of violence menacing or coercing persons seeking employment from entering respondents' place of business.

From this final decree the petitioners sued out a writ of error in the Supreme Court of Illinois and the respondents moved to dismiss it for the reason that the order and opinion on the previous appeal "finally settles all the rights of the parties". In the brief filed by the petitioners they stated: "The writ of error is here presented with knowledge that this court has fully settled all issues of the case in a prior review thereof and that the decree entered by the Appellate Court is in compliance with the mandate of this court . . . . . If this court adheres to the position in *People* v. *Militzer*, 301 Ill. 284, page 287, that issues once decided on review will not be again considered on a second review, a final order in this case may properly dismiss the writ of error on the ground that all issues of the case have been settled on prior appeal and that the decree entered by the Appellate Court is in conformity with the mandate issued to the Appellate Court by this Court."

The Supreme Court of Illinois, without opinion, sustained the motion and dismissed the writ of error. I am unable to say that

is action was an affirmance of any recital in the decree of the ppellate court respecting the legality of peaceful picketing dis-nnected with a continued course of publishing libels, making reats, and using force. If the final decree was right on the round stated by the Supreme Court in sustaining the temporary junction; and if, under the Illinois practice, the affirmance of ch a correct decree based on a previous opinion of the Supreme ourt does not amount to the adoption of a preamble or recital the decree, then we ought not to reverse the final decree of the upreme Court, which, on the facts stated in the complaint, is cor-ct when tested by the principles enunciated in *Ethyl Gasoline orporation* v. *United States*, 309 U. S. 436, 461, and in *Milk Wagon rivers Union* v. *Meadowmoor Dairies, Inc.*, No. 1, October Term, 940, just decided, because of a recital in the decree of the appellate ourt.

The CHIEF Justice joins in this opinion.

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